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POLITICAL JUDGEMENT, FREEDOM OF THOUGHT, AND
STANDARDIZED TESTING: A CRITICAL ENQUIRY

by

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Abstract

The practice of “standardized” testing has been embedded in United States federal education policy since at least the passage of the Elementary and Secondary Education Act of 1965. The roots of standardized testing in American education, grounded in Kantian *Modern Thought*, can be traced to the U.S. Military Academy at Westpoint in the early 1800s and the rise of scientific management in the early 1900s. First and foremost, for a test to be “standardized” the knowledge tested must be assumed to be “true”—universally accepted as being outside the bounds of values.

Consistent with both the views of the Founders and contemporary U.S. Supreme Court decisions that public education is necessary for successful governance, this enquiry recognizes that the primary purpose of American public education has been to prepare students for the fundamental political office of *citizen*. Citizens must ideally be able to make informed political judgements utilizing the full spectrum of *thought*—knowledge in its broadest sense including knowledge unbounded by values. Fundamental to U.S. Constitutional guarantees of freedom of speech is freedom of *thought*. Given the nexus between public education and governance, logic would necessitate a critical examination of whether the practice of standardized testing is consistent with preparing students for citizenship.

Critical Enquiry challenges Modern Thought and other modes of thought with the general methodology following the spirit of Jacques Derrida’s notion of *deconstruction*. The specific analytical framework for this enquiry is Jean-François Lyotard’s notion of “rewriting.” Necessarily, this enquiry begins with a history of freedom of thought beginning

in Ancient Greece and culminating with the U.S. Supreme Court's *Bradenburg* (1969) decision. This is followed by a history of political judgement beginning with Protagoras and ending with John Rawls.

This enquiry reveals that the practice of using government mandated standardized achievement tests of knowledge in American public schools is antithetical to the type of education necessary to prepare students to exercise their right to freedom of thought in order to make informed political judgements. Unbounded political judgement and freedom of thought necessitate that students utilize a wide variety of what Lyotard, following Ludwig Wittgenstein, refers to as "language games" and requires access to multiple viewpoints. Standardized testing, on the other hand, allows for only what Lyotard notes as the denotative (true/false) cognitive language game and privileges the views of certain individuals and groups. Standardized testing constitutes what Lyotard calls a *differend*, is totalitarian in nature, and represents a politics of the intellectual. The practice advocates a particular "Truth" sanctioned by the government and effectively silences teachers, students, and local school districts through terror. The government, through standardized testing, operates as the "majority" language game. In order to redress the *differend*, future enquiry ought to consider policy and practice that would enable American public education to be consistent with the American democratic ideals.

This dissertation is dedicated to:

My parents, Edward and Jeanne, for instilling in me the importance of education and the value of hard-work.

My teacher, Dr. Fazzaro, for introducing me to the work of Jean-François Lyotard which helped me find an intellectual outlet.

My wife, Sharon, for her sacrifice and support throughout the duration of my studies. Also, and most importantly, her daily toleration of me.

My son, Nathan, in the hope that he too can find a passion and never fear to challenge the prevailing notion of “Truth.”

Table of Contents

Chapter		Page
1	Introduction and the Problem.....	1
	Introduction.....	1
	The Problem.....	2
	The Statement of the Problem.....	4
	Framework for the Enquiry.....	4
	The Importance of the Study.....	7
	The Limitations of the Study.....	8
	Summary.....	9
2	History of Freedom of Thought.....	10
	Introduction.....	10
	Purpose of American Public Education.....	10
	Rationale for Freedom of Thought.....	14
	Freedom of Thought Necessary for Freedom of Speech.....	14
	Argument from the Perspective of Truth.....	15
	Argument from the Perspective of Democracy.....	16
	Argument for the Good Life.....	17
	Argument for Individuality.....	17
	Pre-United States Constitution.....	18
	Greece and Rome.....	19
	The Middle Ages.....	20

Chapter	Page
2 (cont.)	
The Renaissance and the Reformation.....	21
Freedom of Religion.	22
The Enlightenment.....	23
United States.	27
Bill of Rights.	27
Sedition Act.....	28
Espionage Act and Clear and Present Danger.	28
Application of Freedom of Speech to the States.	31
Development of Freedom of Thought.	32
Freedom of Thought Decisions.	33
Balancing Test.	36
Brandenburg Test.....	37
Summary.	38
3 Political Judgement from Protagoras to Locke.	39
Introduction.	39
Protagoras.	39
Plato.....	40
Aristotle.	44
Cicero.....	47
Augustine.....	49

Chapter	Page
3 (cont.)	
Thomas Aquinas.	51
Niccolò Machiavelli.	53
Francis Bacon.	55
Thomas Hobbes.	56
René Descartes.	58
John Milton.	60
Benedict De Spinoza.	61
John Locke.	63
Summary.	65
4 Political Judgement from Montesquieu to Rawls.	67
Introduction.	67
Baron de Montesquieu.	67
David Hume.	69
Jean-Jacques Rousseau.	72
Immanuel Kant.	74
Georg W. F. Hegel.	78
John Stuart Mill.	80
Karl Marx.	83
Friedrich Nietzsche.	84
Martin Heidegger.	87

Chapter	Page
4 (cont.)	
John Rawls.....	89
Summary.....	91
5 Standardized Testing and Freedom of Thought: A Lyotardian Examination. . . .	93
Introduction.....	93
Standardized Testing.....	94
Freedom of Thought.....	96
Lyotardian Examination.....	97
Knowledge.....	98
Philosophical Foundations.....	98
Practical Implications.....	99
Language Games.....	100
Philosophical Foundations.....	100
Practical Implications.....	104
Legitimation Through Performativity.....	104
Philosophical Foundations.....	105
Practical Implications.....	107
Legitimation by Paralogy.....	107
Philosophical Foundations.....	108
Practical Implications.....	109
The Phrase.....	110

Chapter	Page
5 (cont.)	
Philosophical Foundations.....	110
Practical Implications.....	111
The <i>Differend</i>	112
Philosophical Foundations.....	112
Practical Implications.....	114
Reality.	114
Philosophical Foundations.....	115
Practical Implications.....	117
Politics.....	118
Philosophical Foundations.....	118
Practical Implications.....	120
Brandenburg Test.....	120
Summary.	121
6 Standardized Testing and Political Judgement: A Lyotardian Examination. . . .	122
Introduction.	122
Political Judgement.	123
Lyotardian Examination.....	124
Paganism.	126
Philosophical Foundations.....	126
Practical Implications.....	128

Chapter	Page
6 (cont.)	
Language Games.	129
Philosophical Foundations.	129
Practical Implications.	131
Justice.	132
Philosophical Foundations.	132
Practical Implications.	133
Politics of Judgement.	134
Philosophical Foundations.	134
Practical Implications.	136
Multiplicity of Language Games.	137
Philosophical Foundations.	137
Practical Implications.	139
Summary.	139
7	
Summary, Conclusions, and Recommendations.	141
Introduction.	141
Summary.	142
Conclusions.	143
Recommendations.	144
Bibliography.	146

Chapter 1

Introduction and the Problem

One's responsibility before thought consists, on the contrary, in detecting differends and in finding the (impossible) idiom for phrasing them. This is what a philosopher does. An intellectual is someone who helps forget differends, by advocating a given genre, whichever one it may be (including the ecstasy of sacrifice), for the sake of political hegemony.¹

-Jean-François Lyotard

Introduction

Although issues surrounding the use of “standardized” testing in American public schools have dominated political discourse for some time, many, if not most, analyses fail to raise fundamental philosophical questions regarding the practice. Ideally, democracy requires citizens who can make informed political judgements in the voting booth, which in turn necessitates citizens utilizing freedom of thought. As a result, it is critical to consider whether the practice of standardized testing is consistent with preparing students for the task of democratic citizenship. In an attempt to examine this question as a philosopher, consistent with Lyotard, this study utilized a framework that challenged traditional education research with the hope of having been responsible before thought.

¹ Jean-François Lyotard, *The Differend: Phrases in Dispute*, trans. Georges Van Den Abbeele (Minneapolis, MN: University of Minnesota Press, 1988), 142.

The Problem

While disagreements took place over what ought to be taught, the role the national government should have, and how schools should be funded, the notion that public education is necessary for successful governance was broadly accepted in the early years of the United States.² The Founders, including, but not limited to, Thomas Jefferson, Benjamin Rush, and George Washington, believed that the primary purpose of public education was to prepare students for the fundamental political office of *citizen*.³ In the logic of ideal democracy, reason would dictate that successful governance requires citizens who possess the ability and resources to make informed political judgements.⁴ David Easton, a distinguished political scientist, described politics as, “the authoritative allocation of values for a society.”⁵ In order to make informed political judgements regarding the allocation of values, citizens must ideally be able to consider the full spectrum of *thought* (knowledge in its broadest sense)—which is the essence of the United States Constitutional guarantee of freedom of speech. Fundamental to freedom of speech is freedom of thought.⁶ Given the nexus between public education and governance, it is necessary to examine whether public education practice is consistent with preparing students for citizenship.

² Lawrence A. Cremin, *American Education: The National Experience 1783-1876* (New York, NY: Harper & Row, Publishers, 1980), 124-128.

³ The purpose of public education for citizenship will be discussed in Chapter 2.

⁴ The notion of political judgement will be discussed at length in Chapter 3 and Chapter 4.

⁵ David Easton, *The Political System: An Inquiry Into the State of Political Science* (New York, NY: Alfred A. Knopf, 1953), 129; David Easton, *A Framework for Political Analysis* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1965), 50.

⁶ The argument that freedom of thought is fundamental to freedom of speech will be made explicitly in Chapter 2. In addition, Chapter 2 will survey the history of freedom of thought.

American public education policy is currently dominated by the practice of standardized testing. Initially becoming commingled with public education after passage of the Elementary and Secondary Education Act of 1965, standardized testing has subsequently remained a requirement in order for states to secure federal funds. Current federal education policy, enacted in 2009, of which standardized testing constitutes a major role, is “Race to the Top.” Designed to encourage certain education reforms, Race to the Top awards competitive grants to qualifying states. The central condition for state recipients is that they develop common standards and then use standardized achievement tests⁷ to assess learning.⁸

Most contemporary examinations of public education policy and practice have been conducted through the guise of Modern Thought. Modern Thought⁹ is characterized by such technologies as the following: division, quantitative rationality, classification, normality, hierarchical ordering, efficiency, theory, systems theory, and progress. A perspective that challenges Modern Thought and other modes of thought is Critical Enquiry.¹⁰ This

⁷ Standardized achievement tests will be discussed in more detail in Chapter 5.

⁸ U.S. Department of Education, “Race to the Top Program: Executive Summary,” November 2009, <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf> (27 October 2010), 2 - 3, 7 - 8.

⁹ For an interesting perspective on how the world became modern see, Stephen Greenblatt, *The Swerve: How the World Became Modern*, (New York, NY: W. W. Norton & Company, 2011).

¹⁰ Critical Enquiry signifies an ongoing project of Charles Fazzaro and his graduate students. The Critical Enquiry project is conscious of the effect of modernity on contemporary education policy and practice and strives to develop approaches to American public education enquiry at a fundamental philosophical level in order to determine whether current education policy and practice is consistent with the American democratic ideals. Fazzaro describes Critical Enquiry as, “a particular kind of enquiry that challenges the traditional notions of ‘research’ regarding the policies and practices of institutions. . . . The capital ‘C’ in Critical emphasizes social criticism at the most fundamental level of what ought to constitute ideal, just, democratic social structures. The capital ‘E’ in Enquiry emphasizes the self-conscious use of all forms of analysis and interpretation of discourses that create, maintain, and justify social structures within particular social, political, economic, and legal contexts. The notion of discourse relative to Critical Enquiry includes meanings consciously expressed through narratives—in the broadest symbolic sense of the notion—including not only phonic and graphic texts, signs, and symbols, but individual and group behaviors and institutional practices.

perspective might yield a fundamentally different analysis regarding whether the practice of standardized testing is consistent with preparing students for citizenship.

The Statement of the Problem

The purpose of this Critical Enquiry was to examine whether the practice of government mandated standardized achievement tests of knowledge in American public schools is consistent with the type of education necessary for citizens to exercise their right to freedom of thought in order to make informed political judgements.

Framework for the Enquiry

The general methodology of Critical Enquiry follows the spirit of the French philosopher Jacques Derrida's notion of deconstruction.¹¹ The views of Jean-François Lyotard (1924 - 1998 CE), the late contemporary French political philosopher, are consistent with the underlying purpose of the Critical Enquiry project and deconstruction, relative to the implications of freedom of thought for political judgement. As such, Lyotard was of particular importance to this study since much of his work challenges the notions of Modern Thought.

The choice of spelling recognizes that enquiry is best used to mean 'to ask' within the general contexts of policies and practices; whereas, inquiry has a narrower focus in that it is best used when referring to a 'formal investigation,' such as that of a crime." Charles J. Fazzaro, "Critical Enquiry: Implications for Education Policy and Practice," *The Journal of Philosophy and History of Education* 52 (2002): 52 - 56.

¹¹ Derrida notes, "The very meaning and mission of deconstruction is to show that things—texts, institutions, traditions, societies, beliefs, and practices of whatever size and sort you need—do not have definable meanings and determinable missions, that they are always more than any mission would impose, that they exceed the boundaries they currently occupy. What is really going on in things, what is really happening, is always to come. Every time you try to stabilize the meaning of a thing, to fix it in its missionary position, the thing itself, if there is anything at all to it, slips away. A 'meaning' or a 'mission' is a way to contain and compact things, like a nutshell, gathering them into a unity, whereas deconstruction bends all its efforts to stretch these boundaries, to transgress these confines, to interrupt and disjoin all such gathering." Jacques Derrida, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida*, ed. John D. Caputo (New York, NY: Fordham University Press, 1997), 31-32.

Liotard was born in Versailles and is generally associated with the movement called post-structuralism. In a general sense, post-structuralism challenges the scientific assumptions of structuralism and the notion that the signified can ever have a stable meaning.¹² Lyotard studied philosophy and literature at the Sorbonne in Paris under Maurice Merleau-Ponty.¹³ His early writings, during the 1940s and early 1950s, reflected his strong interest in politics. His first book, *Phenomenology*,¹⁴ surveyed the history of phenomenology linking it with Marxism. Teaching in Algeria during the colonial war profoundly affected Lyotard and when he returned to France he became involved with the Marxist group *Socialisme ou Barbarie*.¹⁵ After abandoning Marxism, Lyotard witnessed the May 1968 student movement while he lectured at Nanterre University. In 1971, Lyotard earned his doctorate. His dissertation was titled *Discourse, Figure*,¹⁶ and he became a professor of philosophy at Vincennes University.¹⁷

¹² For a more thorough distinction see, Steven Best and Douglas Kellner, *Postmodern Theory: Critical Interrogations* (New York, NY: The Guilford Press, 1991), 20-25.

¹³ Maurice Merleau-Ponty (1908 - 1961 CE) was a French phenomenologist who taught at the Sorbonne. He was influenced by Edmund Husserl (1859 - 1938 CE), the German philosopher and founder of phenomenology. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Merleau-Ponty, Maurice" and "Husserl, Edmund."

¹⁴ Jean-François Lyotard, *Phenomenology*, trans. Brian Beakley, (Albany, NY: State University of New York Press, 1991).

¹⁵ *Socialisme ou Barbarie* was founded by Cornelius Castoriadis (1922 - 1997 CE) and Claude Lefort (1924 - 2010 CE). A major emphasis of the group was to develop "a theory of state capitalism" based on a Marxist methodology. Best and Kellner, 148, 179; *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Lyotard, Jean-François."

¹⁶ Jean-François Lyotard, *Discourse, Figure*, trans. Antony Hudek and Mary Lydon (Minneapolis, MN: University of Minnesota Press, 2011).

¹⁷ Best and Kellner, 147-148, 179; *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Lyotard, Jean-François."

In *Discourse, Figure*, Lyotard challenged many of the assumptions behind structuralism which he would continue to do for the remainder of his life. *Libidinal Economy*¹⁸ was Lyotard's other major early work and signified Lyotard's final split with Marxism. His next three major publications include *Just Gaming*,¹⁹ *The Postmodern Condition*,²⁰ and *The Differend*. In these three works, Lyotard developed a philosophy of language that is concerned with making judgements. Lyotard's later work continued to focus on politics, aesthetics, and postmodern ideas. Lyotard's last major work was *Lessons on the Analytic of the Sublime*.²¹ In this publication, Lyotard provided a critical reading of part of Kant's third critique, the *Critique of Judgement*.²² The analytical framework for this study was based around Lyotard's notion of "rewriting."

Lyotard used the term "rewriting modernity" to describe his work instead of popularized terms such as "postmodernity," "postmodernism," or "postmodern."²³ For Lyotard, rewriting rejects the notion that the postmodern can in any way be separate from the modern. Lyotard explains that, "Modernity is constitutionally and ceaselessly pregnant with

¹⁸ Jean-François Lyotard, *Libidinal Economy*, trans. Iain Hamilton Grant (Bloomington, IN: Indiana University Press, 1993).

¹⁹ Jean-François Lyotard and Jean-Loup Thébaud, *Just Gaming*, trans. Wlad Godzich (Minneapolis, MN: University of Minnesota Press, 1985).

²⁰ Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans. Geogge Bennington and Brian Massumi (Minneapolis, MN: University of Minnesota Press, 1984).

²¹ Jean-François Lyotard, *Lessons on the Analytic of the Sublime*, trans. Elizabeth Rottenberg (Stanford, CA: Stanford University Press, 1994).

²² Immanuel Kant, *Critique of Judgment*, trans. J.H. Bernard (New York, NY: Barnes & Noble, 2005).

²³ Jean-François Lyotard, *The Inhuman: Reflections on Time*, trans. Geoffrey Bennington and Rachel Bowlby (Stanford, CA: Stanford University Press, 1991), 24.

its postmodernity.”²⁴ Rewriting is similar to the Freudian concept of “working through.” Lyotard described working through as, “work without end,” and the rules for this type of analysis are, “do not prejudge, suspend judgment, give the same attention to everything that happens as it happens.”²⁵ As such, this Critical Enquiry, through the use of a Lyotardian analytical framework, was a deconstruction of the practice of standardized testing embedded in federal education policy as it relates to the type of education necessary for citizenship.

The Importance of the Study

Given the pivotal role educators play in preparing students for citizenship, educators ought to continually examine whether current public education policy and practice is consistent with the task of preparing students to be citizens. Justice Frankfurter noted the importance of this in the landmark 1952 United States Supreme Court case *Wieman v. Updegraff* arguing:

It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry.²⁶

In addition, historically, there are notable cases wherein public education policy and practice have not been consistent with the democratic ideals. For example, citizens of color have only recently begun to exercise their rights inherent in the American democratic ideal. Even after

²⁴ Lyotard, *The Inhuman*, 25.

²⁵ Lyotard, *The Inhuman*, 30.

²⁶ *Wieman et al. v. Updegraff et al.*, 344 U.S. 183 (1952).

the abolishment of slavery in 1865,²⁷ African Americans were unable to attend equal public schools until at least *Brown v. Board of Education*.²⁸ Full legal access and equity in the voting booth was not realized by African Americans until the elimination of the poll tax in 1964.²⁹ Similar examples could be provided for other minorities in both public education and the broader society at large.

Many, if not most, studies in education are grounded in the notions of Modern Thought. Critical Enquiry, on the other hand, provides a unique perspective for the critique because Critical Enquiry can utilize a much broader philosophical lens. Through Critical Enquiry, this study found that inconsistencies exist between the practice of standardized testing and the type of education necessary for citizens to exercise their right to freedom of thought in order to make informed political judgements. As a result, the analysis contained in this Critical Enquiry could be used to influence public discourse.

The Limitations of the Study

As a Critical Enquiry, this study strived to determine if questions ought to be raised concerning the consistency between the American democratic ideals and education policy and practice. As such, this study does not necessarily provide any universal prescriptions designed to guide the future of public education or establish any particular conception of “Truth,” but instead included a broad analysis that sought to look at the problem in an entirely new way. This Critical Enquiry was meant to be descriptive only.

²⁷ U.S. Constitution. amend. XIII.

²⁸ *Brown et al. v. Board of Education of Topeka et al.* 347 U.S. 483 (1954).

²⁹ U.S. Constitution. amend. XXIV.

Summary

This Critical Enquiry concerned the requirement that public schools use “standardized” achievement tests of knowledge in order to qualify for federal funds as mandated in the U.S. Department of Education’s Race to the Top policy. The framework used for the enquiry was Lyotard’s notion of rewriting. In order to conduct this enquiry and provide context for the reader, it was necessary for several chapters to provide the foundation. Chapter 2 is a history of freedom of thought. Chapters 3 and 4 are a survey of the notion of political judgement from Protagoras to Rawls. Chapters 5 and 6 are a Lyotardian examination. Chapter 5 is an analysis of the implications of the practice of standardized testing on freedom of thought, while Chapter 6 is an analysis of the implications of standardized testing on political judgement. Lastly, Chapter 7 is a summary of the study, conclusions, and recommendations.

Chapter 2

History of Freedom of Thought

The First Amendment is meant to assure Americans that they can believe what they will and say what they believe.¹

-Anthony Lewis

Introduction

In order to examine whether the practice of government mandated standardized achievement testing is consistent with the type of education necessary for citizens to exercise their right to freedom of thought in order to make informed political judgements, it is necessary to provide a contextual framework. This chapter is a survey of the history of freedom of thought. This survey depends on a discussion of the purpose of American public education, the connection between freedom of thought and freedom of speech, and the various rationales for freedom of speech.

Purpose of American Public Education

The primary purpose of American public education has been to prepare students for the fundamental political office of citizen. The views of the Founders, including, but not limited to, Thomas Jefferson, Benjamin Rush, and George Washington support this notion.

¹ Anthony Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment*, (New York, NY: Basic Books, 2007), 106.

Jefferson believed that public education was necessary for good governance and that the purpose of education was to produce citizens. In a letter written to Benjamin Franklin in 1777, Jefferson said, “Educate and inform the whole mass of the people. Enable them to see that it is their interest to preserve peace and order, and they will preserve them. And it requires no very high degree of education to convince them of this. They are the only sure reliance for the preservation of our liberty.”² He further illustrated this position in a letter to his former professor in support of a bill for general education:

I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness. . . . The tax which will be paid for this purpose is not more than the thousandth part of what will be paid to kings, priests, and nobles who will rise up among us if we leave the people in ignorance.³

The necessary link between public education and the success of the government is evident in Jefferson’s thought.

Consistent with Jefferson’s notion of education, Rush, in his presentation to the legislature of Pennsylvania in 1786, not only supported the idea that public schools should be established, but also echoed the view that schools are essential for good governance. He urged the citizens of Pennsylvania to support the establishment of free public schools in every township to be paid for by taxes. Rush believed that education provided benefits for all members of society, thus all should pay. He argued that learning is both helpful for

² Thomas Jefferson, *Jefferson Himself: The Personal Narrative of a Many-sided American*, ed. Bernard Mayo (Boston, MA: Houghton Mifflin Company, 1942), 145.

³ Jefferson, *Jefferson Himself*, 89.

citizens to understand their rights and “it promotes just ideas of laws and government.”⁴ Rush also illustrated the purpose of public education for citizenship in his essay, “Of the Mode of Education Proper in a Republic.” He explained, “Our schools of learning, by producing one general, and uniform system of education, will render the mass of the people more homogenous, and thereby fit them more easily for uniform and peaceable government.”⁵

Washington also could foresee the importance of education to good governance. Washington mentioned this in 1790 during his first message to Congress when he explained, “There is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the surest basis of happiness. In one in which the measure of government receives their impressions so immediately from the sense of the community as in ours, it is proportionally essential.”⁶ Washington further illustrated this point when giving his farewell address in 1796, “Promote, then, as an object of primary importance, institutions, for the general diffusion of knowledge. In proportion as the structure of a government gives force of public opinion, it is essential that public opinion be enlightened.”⁷ Jefferson, Rush, and Washington recognized the importance of preparing students for citizenship.

⁴ Benjamin Rush, *Essays: Literary, Moral and Philosophical*, ed. Michael Meranze (Schenectady, NY: Union College Press, 1988), 1-4.

⁵ Rush, *Essays*, 5.

⁶ Ellwood P. Cubberley, *Public Education in the United States: A Study and Interpretation of American Educational History*, rev. ed (Cambridge, MA: The Riverside Press, 1934), 89.

⁷ Ellwood P. Cubberley, *A Brief History of Education: A History of the Practice and Progress and Organization of Education* (Boston, MA: Houghton Mifflin Company, 1922), 287.

Contemporarily, Newton Edwards, an education legal historian, summarized the connection between government and education. He concluded:

No one familiar with the record can doubt that the dynamics of public education in this country is to be found in the emergence of the democratic state as a form of political organization. The essentially civic character of American education is amply documented in the writings of statesmen and publicists, in the debates of constitutional conventions, in the official pronouncements of organized labor, in editorial opinion, and in numerous court decisions.⁸

Edwards best summarized the legal theory regarding the importance of public education to government noting, “Public education is not merely a function of government; it is of government.”⁹

This perspective has been recognized by the United States Supreme Court in 2003 in *Grutter v. Bollinger*. Justice Sandra Day O’Connor, delivering the opinion for the court upholding the law school admissions standards of the University of Michigan, quoted from the 1954 landmark United States Supreme Court decision *Brown v. Board of Education*,¹⁰ explaining that, “This court has long recognized that ‘education . . . is the very foundation of good citizenship.’”¹¹ Citizens are required to make informed political judgements which requires freedom of thought.

⁸ Newton Edwards, “The Evolution of American Educational Ideals,” in *Education in a Democracy*, ed. Newton Edwards (Chicago, IL: The University of Chicago Press, 1941), 13.

⁹ Newton Edwards, *The Courts and Public Schools: The Legal Basis of School Organization and Administration*, 3rd ed. (Chicago, IL: The University of Chicago Press, 1971), 23.

¹⁰ *Brown v. Board*.

¹¹ *Grutter v. Bollinger et al.*, 539 U.S. 306 (2003).

Rationale for Freedom of Thought

The First Amendment of the United States Constitution establishes that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹² As argued below, fundamental to the citizens’ right to freedom of speech is freedom of thought.

Freedom of Thought Necessary for Freedom of Speech

The importance of freedom of thought for freedom of speech was exemplified by Samuel Adams shortly after the Declaration of Independence was adopted. Adams explained, “Driven from every corner of the earth, freedom of thought and the right of private judgement in matters of conscience direct their course to this happy country for their last asylum.”¹³ J. B. Bury, an eminent British historian, agreed and noted that, “freedom of thought, in any valuable sense, includes freedom of speech.”¹⁴ Thomas I. Emerson, a noted legal theorist, concurs explaining, “Freedom of thought and communication are central to any system of individual rights.”¹⁵

Contemporarily, this position has been supported in 1943 by Justice Murphy of the United States Supreme Court. Justice Murphy’s concurring opinion in the United States

¹² U.S. Constitution. amend. I.

¹³ Samuel Adams, “Speech in Philadelphia,” 1 August 1776, quoted in Anthony Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment*, (New York, NY: Basic Books, 2007), 183.

¹⁴ J. B. Bury, *History of Freedom of Thought* (New York, NY: Henry Holt and Company, 1913), 8.

¹⁵ Thomas I. Emerson, “Freedom of Speech,” in *The First Amendment: Selections from the Encyclopedia of the American Constitution*, ed. Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney (New York, NY: Macmillan Publishing Company, 1990), 21.

Supreme Court decision *West Virginia v. Barnette* illustrates the importance of freedom of thought for freedom of speech. Justice Murphy explained, “The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society.”¹⁶ Robert Hargreaves, a noted contemporary journalist, best explains the importance of freedom of thought and of freedom of speech arguing that, “It entails the freedom to be provocative - to say things that cause offence, to insult the opinions of others, to impart information others may wish to suppress, to voice views others may hate. It also entails the duty to be tolerant of those who voice such views, however much one personally disagrees with them.”¹⁷ An explicit connection exists between freedom of thought and freedom of speech. In a sense, the two could almost be used interchangeably. There are four major rationales for freedom of speech. These include the argument from the perspective of truth, the argument from the perspective of democracy, the argument for the good life, and the argument for individuality.

Argument from the Perspective of Truth

One rationale for freedom of speech is the argument from the perspective of truth. This position argues that in order to effectively search for truth, one must be able to engage in open dialogue without fear of being reprimanded for any position contrary to the majority opinion. Underlying this position is the argument that the truth will become evident when

¹⁶ *West Virginia State Board of Education et al. v. Barnette et al.*, 319 U.S. 624 (1943).

¹⁷ Robert Hargreaves, *The First Freedom: A History of Free Speech*, (Stroud, England: Sutton Publishing Limited, 2002), 311.

all opinions have had the opportunity to be discussed. Frederick Schauer, Professor of Law at the University of Virginia School of Law, summarizes this view noting:

They all share a belief that freedom of speech is not an ends but a means, a means of identifying and accepting truth. Further, they have a common faith in the power of truth to prevail in the adversary process, to emerge victorious from the competition among ideas. Finally, they share a deep scepticism with respect to accepted beliefs and widely acknowledged truth, logically coupled with a keen recognition of the possibility that the opinion we reject as false may in fact be true. A heavy dose of fallibilism is implicit in the view that freedom of speech is a necessary condition to the rational search for truth.¹⁸

Indicative in this position is also the fear that the government, if given the ability to determine truth, will error. This position has also been compared to a cross-examination in the judicial system in which public opinion is the jury. Similar to the argument from the perspective of truth is the argument from the perspective of democracy.¹⁹

Argument from the Perspective of Democracy

Another rationale for freedom of speech is the argument from the perspective of democracy. This position argues that since the people are sovereign in a democracy, it is necessary for the people to possess freedom of speech to exercise their political rights. Possessing this freedom is vital for a variety of political reasons. First, citizens need access to information in order to make informed political judgements. Second, citizens need to be able to openly discuss and debate these issues in order for a healthy democracy to function. Finally, it is necessary for citizens in a democracy to have the freedom to disagree with the government and openly criticize the government and government officials since they are

¹⁸ Frederick Schauer, *Free Speech: a philosophical enquiry*, (Cambridge, England: Cambridge University Press, 1982), 15 - 16.

¹⁹ Hargreaves, *The First Freedom*, 304.

accountable to the people. Another rationale for freedom of speech is that it is necessary for the good life.²⁰

Argument for the Good Life

The argument for freedom of speech being necessary for the good life is based on the notion that freedom of speech is not just a societal right, but an individual right. Schauer explains:

The argument is based on the proposition that a person who uses his faculties to their fullest extent, who is all that it is possible to be, is in some sense better off, and in an Aristotelian sense happier, than those whose development is stultified. And because it is thinking, reasoning, rationality, and complex interrelationships with others that distinguish humanity from other forms of animal life, then it is the faculties of reason and thinking that are at the core of self-development. What is seen as the ultimate goal for man is the fullest use of the capacity to think, the greatest degree of mental exertion, the exploration of the limits of the mind.²¹

The argument for the good life is based on the idea that communication of ideas provides personal fulfillment and growth for the individual and should thus be protected. On the other hand, this position argues that the curtailment of freedom of thought interferes with individual development. Essentially, this position is an argument based on the notion of liberty. Similar to the argument for the good life is the argument for individuality.²²

Argument for Individuality

The argument justifying freedom of speech based on individuality is really an argument advocating liberalism. Schauer explains the argument noting:

²⁰ Schauer, *Free Speech*, 35 - 36; Hargreaves, *The First Freedom*, 304 - 305; Emerson, "Freedom of Speech," 21.

²¹ Schauer, *Free Speech*, 47, 54; Emerson, "Freedom of Speech," 20.

²² Emerson, "Freedom of Speech," 20.

When the state suppresses a person's ideas, or when the state suppresses that person's expression of those ideas, the state is insulting that person and affronting his dignity. . . . When we suppress a person's ideas, we are in effect saying that although he may think his ideas to be as good as (or better than) the next person's, society feels otherwise. . . . He is not deserving of treatment as an equal member of society.²³

The argument above is made regarding equality, but it could also be made with respect to diversity or autonomy. All four arguments for freedom of speech share a common theme acknowledging some type of separation between the government and individuals.²⁴ Schauer, succinctly describes this general rationale for freedom of speech noting that it:

is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.²⁵

The rest of this chapter is a survey of the history of freedom of thought.

Pre-United States Constitution

As a result of Greece's attempt at democracy, this history of freedom of thought in the West begins in Greece. Freedom of thought's evolution continues in Rome, the Middle Ages, the Renaissance and the Reformation, the struggle for freedom of religion, and the Enlightenment. The following sections are an exploration of the history of freedom of thought prior to the codification of freedom of speech in the Bill of Rights to the United States Constitution.

²³ Schauer, *Free Speech*, 62.

²⁴ While ultimately the people are sovereign in a democracy, it is critical that the minority be protected from the tyranny of the majority. It is in this sense that the term government is used.

²⁵ Schauer, *Free Speech*, 86.

Greece and Rome

The freedom to critique was a common theme throughout Greek society, especially in philosophy, literature, and science. Examples include the work of Xenophanes (570 - 475 BCE),²⁶ Heraclitus (fl. 500 BCE),²⁷ and Democritus (460 - 370 BCE).²⁸ All three, among others, challenged the everyday conceptions of common people. The Sophists²⁹ offer another example of thought that in many cases was contrary to public opinion. In addition, democracy had taken root in Greece which provided citizens with the opportunity to express their opinion in an open forum. The most important example for freedom of thought rests with Socrates (469 - 399 BCE).³⁰

Socrates advocated open discussion in an attempt to arrive at truth.³¹ He rejected the notion that truth was constituted by the majority believing instead that reason ought to be used in order to determine truth. Late in life, Socrates was accused of impiety. Refusing to change his opinion, Socrates argued that individual truth ought to take precedent over the law and that open discussion and debate is necessary in society. While the state did execute

²⁶ Xenophanes was a Greek rationalist who challenged Homer's teachings of the Greek gods. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Xenophanes."

²⁷ Heraclitus was a Greek philosopher who argued that most humans were unaware of the *logos*, his principle of order in the world, and as a result have no understanding of reality. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Heraclitus."

²⁸ Democritus was a Greek philosopher who developed the notion of atomic theory. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Democritus."

²⁹ The Sophists refer to a number of ancient Greeks who offered instruction for money. As a whole they did not subscribe to any particular ideology. The term is regularly used in the pejorative sense. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Sophists."

³⁰ Bury, *History of Freedom of Thought*, 22 - 30.

³¹ Since the story of Socrates is told through Plato, this truth must be consistent with Plato's ideal forms.

Socrates for exercising freedom of thought, the notion of freedom of thought would continue to evolve in Greece and then into Rome.³²

The evolution of freedom of thought in Hellenistic society is evident in the rationalist works of the Epicureans,³³ Stoics,³⁴ and Sceptics.³⁵ By the time of the late Roman Republic, almost no attempt was made to restrict either religion or individual opinion, except in the case of Christianity. While freedom of thought was widely accepted, no formal policy has yet been found that provided legal protection for it. After the issue of the edicts of toleration (311 and 313 CE), this lack of formal protection for freedom of thought would lead to the repression of freedom of thought during the Middle Ages.³⁶

The Middle Ages

Shortly after the enactment of the above edicts, Christianity was established as the official religion of Rome by Constantine the Great. Freedom of thought, as a result, took a hiatus during the Middle Ages. Although Christianity had previously called for freedom of thought when it was a minority, once it became the official religion it established itself as the

³² Bury, *History of Freedom of Thought*, 30 - 35.

³³ The Epicureans were one of the leading philosophical schools in Hellenistic philosophy. They challenged traditional interpretation of the creation of the world by rejecting the notion of any sort of divine entity responsible for the creation of the world. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Epicureanism."

³⁴ The Stoics were one of the leading philosophical schools in Hellenistic philosophy. Justice, according to the Stoics, can only be found in an idealized sage who acts only according to correct reason. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Stoicism."

³⁵ The Sceptics challenged the notions of both the Epicureans and Stoics with respect to the justification of knowledge. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "skepticism."

³⁶ Bury, *History of Freedom of Thought*, 36 - 41, 46 - 51.

only form of truth, arguing that the only way to get to heaven is through the Church.³⁷ By the thirteenth century, the Pope controlled the kings of Europe and made the practice of stamping out opposition to the Church a condition of continued sovereignty for the kings. It was the height of the Inquisition and the Church was the ultimate authority on truth throughout the Middle Ages.³⁸

The Renaissance and the Reformation

The Renaissance is what began the process of restoring freedom of thought from the hands of the Church. The literature and philosophy of Ancient Greece and Rome resurfaced. Intellectuals were able to compartmentalize religion from the classics. The Reformation replaced the Church with the Bible with respect to sovereignty. Despite Luther and Calvin being opponents of freedom of thought, inadvertently the Reformation provided the conditions necessary for freedom of thought to begin to resurface since Christianity divided into multiple entities and the Bible opened up to multiple interpretations. A culture of intellectual pursuit developed throughout Europe at the same time as the power of the Papacy declined.³⁹

Despite this new atmosphere, the Church still clung to power. Attempts to pursue truth through science were met with imprisonment in the case of Roger Bacon (1214 - 1293

³⁷ The forthcoming nine hundred (900) years were not of great significance to the history of freedom of thought. As a result, this survey continues in the thirteenth century.

³⁸ Bury, *History of Freedom of Thought*, 51 - 53, 57 - 59.

³⁹ Bury, *History of Freedom of Thought*, 71 - 73, 75 - 82.

CE).⁴⁰ After Copernicus established modern astronomy in 1543 when he argued for a heliocentric cosmology, Galileo faced the Inquisition after providing evidence for the theory by way of the telescope. Censorship was also utilized, via the *Roman Index*, after the invention of the printing press in an attempt to keep new ideas from spreading in an effort to curtail freedom of thought. Interestingly, the evolution of freedom of thought would be helped by the development of freedom of religion.⁴¹

Freedom of Religion

At the beginning of the fifteenth century, the notion of religious liberty was virtually unknown in Western states. By the nineteenth century, it was almost universally accepted. The implementation of religious liberty took two different forms. The first form, the jurisdictional approach, is what primarily took root in Europe in which the state was aligned with the major Church, but allowed other minority sects to function without persecution. The second form, through separation, is what eventually took place in America.⁴²

Initially, in America, little toleration occurred, such as in the case of the Puritans. The Puritans (1620 CE) were interested in establishing a theocratic government, not a government based on separation of church and state. On the other hand, Roger Williams, who founded Providence, Rhode Island (1636 CE), established a system of government in which the government could not intervene with religion. While all Christians from any sect

⁴⁰ Roger Bacon was an English philosopher who believed that reason could be used in the service of theology. He was also controversial with respect to his efforts for curricular reform. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Bacon, Roger."

⁴¹ Bury, *History of Freedom of Thought*, 65, 87 - 91.

⁴² Bury, *History of Freedom of Thought*, 95.

enjoyed full political rights, those that did not profess to Christianity were not allowed to take part in the political process. Eventually, after many setbacks, the attitude of freedom of religion culminated with the ratification of the Bill of Rights to the United States Constitution in 1791. Many of the social and political conditions that allowed this to occur were due to the Enlightenment.⁴³

The Enlightenment

The Enlightenment consisted of a dramatic upheaval in the realm of social and political thought. The notion of rational thought was privileged during this period. Many of the ideas constructed during the Enlightenment affected the trajectory of freedom of thought. Of critical importance is the work of John Milton, John Locke, Thomas Paine, and John Stuart Mill.

John Milton (1608 - 1674 CE),⁴⁴ the early Enlightenment poet most famous for *Paradise Lost*,⁴⁵ was a leading supporter of freedom of thought. In response to a government order requiring official approval before any publication, Milton penned the *Areopagitica*, arguing for the importance of freedom of the press.⁴⁶ Milton believes that allowing people to read a variety of sources, both good and bad, will help better develop virtue. Milton also argues that without freedom of press, ideas from other cultures, and even new ideas, that

⁴³ Bury, *History of Freedom of Thought*, 96 - 98, 125.

⁴⁴ John Milton's political philosophy will be discussed further in Chapter 3.

⁴⁵ John Milton, *Paradise Lost*, in *The Major Works*, ed. Stephen Orgel and Jonathan Goldberg, (Oxford: Oxford University Press, 2003).

⁴⁶ John Milton, *Areopagitica*, in *The Major Works*, ed. Stephen Orgel and Jonathan Goldberg, (Oxford: Oxford University Press, 2003).

might initially conflict with the current notion of truth would be stamped out without due consideration. He is especially concerned for such professions as teachers and doctors who would have to constantly worry that an authority might alter the work. Milton best explains his position noting, “Truth and understanding are not such wares as to be monopolized and traded in by tickets, and statutes, and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broadcloth and our woolpacks.”⁴⁷ Milton also makes the argument, without explicitly stating it, that freedom of press is necessary for freedom of speech since it is vital that citizens have the right to express their position. This in turn requires freedom of thought of which Milton unequivocally supported arguing, “Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.”⁴⁸

John Locke (1632 - 1704 CE),⁴⁹ the English empiricist, argued for the importance of freedom of thought in his *Letter Concerning Toleration*.⁵⁰ Locke believed in a distinct separation between religion and government. While his argument dealt primarily with religion, the implication is that the government lacks the authority to compel citizens to believe in a particular notion of “Truth.” Locke expounds:

the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man’s goods and person. And so it ought to be ; for truth certainly would do well

⁴⁷ Milton, *Areopagitica*, 248, 256 - 257, 263, 270 - 271.

⁴⁸ Milton, *Areopagitica*, 262 - 263, 268.

⁴⁹ John Locke’s political philosophy will be discussed further in Chapter 3.

⁵⁰ John Locke, *A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven, CT: Yale University Press, 2003).

enough, if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known, and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succours. But if truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.⁵¹

Locke supports the notion of freedom of thought by recognizing that “Truth” is not within the realm of the governmental jurisdiction.

Thomas Paine (1737 - 1809 CE), author of *Common Sense*,⁵² was instrumental in turning American public opinion towards separation from Great Britain. He was also an ardent supporter of freedom of thought. Paine illustrated his desire for freedom:

O ye that love mankind! Ye that dare oppose, not only the tyranny, but the tyrant, stand forth! Every spot of the old world is overrun with oppression. Freedom hath been hunted round the globe. Asia, and Africa, have long expelled her. – Europe regards her like a stranger, and England hath given her warning to depart. O! Receive the fugitive, and prepare in time for an asylum for mankind.⁵³

The Declaration of Independence, in part as a result of Paine’s efforts, was issued leading to the Revolutionary War. In Paine’s other famous work *The Rights of Man*,⁵⁴ Paine continues his argument for freedom of thought while rallying against the English government. Paine explains, “Toleration is not the opposite of Intolerance, but is the counterfeit of it. Both are

⁵¹ Locke, *A Letter Concerning Toleration*, 219, 241.

⁵² Thomas Paine, *Common Sense*, (Mineola, NY: Dover Publications, 1997).

⁵³ Paine, *Common Sense*, 33.

⁵⁴ Thomas Paine, *The Rights of Man*, Kindle edition.

despotisms. The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it.”⁵⁵ Freedom of thought, for Paine, ought to rest with the people.

Another important Enlightenment figure during the evolution of freedom of thought was John Stuart Mill (1806 - 1873 CE).⁵⁶ Mill was a British philosopher who composed the famous defense of liberty, *On Liberty*.⁵⁷ In it, Mill argues that for liberty to exist in society, the people need to be protected both from the government and from popular opinion. He is an ardent supporter of the right for the minority to disagree with the majority. Mill notes, “If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”⁵⁸ Echoing a libertarian philosophy, Mill believes that the only just reason a government can use force is to prevent harm. Explaining the role of an individual to society, Mill explains, “The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”⁵⁹ Freedom of thought is absolute in every spectrum of thought for Mill and his work among others, would influence the development of freedom of thought in the United States.

⁵⁵ Paine, *The Rights of Man*, location 852.

⁵⁶ John Stuart Mill’s political philosophy will be further discussed in Chapter 4.

⁵⁷ John Stuart Mill, *On Liberty*, (London, England: The Walter Scott Publishing Company) Kindle edition.

⁵⁸ Mill, *On Liberty*, location 259, 442

⁵⁹ Mill, *On Liberty*, location 331, 345.

United States

Although a reading of the First Amendment could be construed as absolute, the protections it affords from the government have never been treated that way. In reality, the United States, primarily through the United States Supreme Court, has attempted to balance the freedoms protected by the First Amendment⁶⁰ with other interests. The following sections are an exploration of the history of freedom of thought in the United States beginning with the Bill of Rights.

Bill of Rights

The Bill of Rights came about after opposition emerged from some states over the ratification of the United States Constitution. Those in opposition, the Anti-Federalists, were concerned that the federal government would have too much power over both the states and the people. Ratification of the Constitution occurred as a result of pressing by John Hancock to have Congress enact a bill of rights during the first session. James Madison, initially opposed to a bill of rights, was instrumental in securing passage by arguing for the importance of freedom of speech for the American principle of popular sovereignty. The *Federalist Papers* popularized many of the above Enlightenment arguments for freedom of thought. As a result of the efforts of both Hamilton and Madison, the Bill of Rights to the United States Constitution was ratified in December of 1791 in which freedom of speech was embedded in the First Amendment.⁶¹

⁶⁰ Although this enquiry deals primarily with the freedom of thought and freedom of speech, the freedom of speech clause of the First Amendment has implications for all other parts of the First Amendment.

⁶¹ Lewis, *Freedom for the Thought That We Hate*, 7 - 9; Akhil Reed Amar, *America's Constitution*, (New York, NY: Random House Trade Paperbacks, 2005), 103. For more information see, Richard Labunski, *James Madison and the Struggle for the Bill of Rights*, (Oxford, England: Oxford University Press, 2006).

Sedition Act

The first battle over freedom of speech protection began in 1798 with the passage of the Sedition Act signed by President John Adams. The act criminalized the composition or publication of anything critical of the government. The law was political in nature since it was set to expire a day prior to the next president's inauguration and was primarily used against supporters of Thomas Jefferson. The Sedition Act dominated the politics of the Election of 1800. Popular opinion was against the Sedition Act helping Jefferson to defeat Adams in the Election of 1800. Opponents of the Sedition Act utilized the language of the First Amendment in their defense. President Jefferson, consistent with public opinion, pardoned every citizen that was convicted under the law. While the Sedition Act was never challenged in court, it did raise the issue of freedom of speech and freedom of the press. The issue of freedom of speech would not be raised again at the federal level until 1919 when the United States Supreme Court upheld multiple convictions under the Espionage Act.⁶²

Espionage Act and Clear and Present Danger

No federal law that restricted a freedom contained in the Bill of Rights was passed again until 1917 when the Espionage Act was passed. The Espionage Act was signed at the height of World War I criminalizing any attempt to restrict the recruitment process of the military or dissuade someone from participating in the armed services. In March of 1919, three cases were decided by the United States Supreme Court, all resulting in unanimous

⁶² Lewis, *Freedom for the Thought That We Hate*, 11 - 16, 20 - 21.

opinions upholding convictions made under the Espionage Act. The cases included *Schenck v. United States*, *Debs v. United States*, and *Frohwerk v. United States*.⁶³

Schenck involved the arrest, under the Espionage Act, of men who had distributed leaflets encouraging people to resist the military draft. In their appeal to the United States Supreme Court, the defendants argued that the Espionage Act violated their right to freedom of speech and freedom of the press protected under the First Amendment. Justice Holmes delivered the unanimous opinion of the court:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* [emphasis added] that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.⁶⁴

Justice Holmes, as a result of the country being engaged in war, argued that the convictions ought to stand. In addition, Justice Holmes established “clear and present danger” as the first method the United States Supreme Court used to determine whether speech ought to be protected under the First Amendment. The clear and present danger doctrine argued that

⁶³ Lewis, *Freedom for the Thought That We Hate*, 23, 25 - 27; *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

⁶⁴ *Schenck*.

speech can only be suppressed when harm might immediately take place. This required a connection between speech and action.⁶⁵

Debs and *Frohwerk* were similar to *Schenck*. *Debs* was convicted under the Espionage Act as a result of giving a speech construed as anti-war and *Frohwerk* was convicted under the Espionage Act as a result of publishing newspaper articles critical of the war effort. Both cases resulted in unanimous decisions, based on the same logic as *Schenck*, with Justice Holmes delivering the opinion of the court. Holmes noted:

the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.⁶⁶

Following the criteria for clear and present danger, all three cases illustrate the balancing act the United States Supreme Court has struck with respect to the First Amendment. Interestingly, several months later, a shift developed within the Supreme Court.

In November of 1919 a fourth case dealing with the Espionage Act reached the Supreme Court. *Abrams v. United States* involved the conviction of four individuals who distributed leaflets protesting United States intervention in Russia and the United States government in general. Again, the court upheld the conviction, but the decision was not unanimous. Both Justice Holmes and Justice Brandeis dissented. Justice Holmes clarified and amended his clear and present danger doctrine in his dissent:

⁶⁵ Martin Shapiro, "Clear and Present Danger," in *The First Amendment: Selections from the Encyclopedia of the American Constitution*, ed. Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney (New York, NY: Macmillan Publishing Company, 1990), 114.

⁶⁶ *Debs; Frohwerk*.

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of Schenck, Frohwerk and Debs, were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.⁶⁷

The majority decided the case based on the “bad tendency test.” This test had roots in English law and removed the nexus between speech and action established in the clear and present danger doctrine. Almost all freedom of speech cases during the next decade lost, as a result of the bad tendency test being used instead of the clear and present danger doctrine. Both Justice Holmes and Justice Brandeis dissented throughout the decade.⁶⁸

Application of Freedom of Speech to the States

The only victory for freedom of speech during this period occurred in 1925. Even though the court did not overrule the conviction in *Gitlow v. New York*, the majority decided

⁶⁷ Lewis, *Freedom for the Thought That We Hate*, 28 - 29; Abrams et al. v. United States, 250 U.S. 616 (1919).

⁶⁸ Martin Shapiro, “Bad Tendency Test,” in *The First Amendment: Selections from the Encyclopedia of the American Constitution*, ed. Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney (New York, NY: Macmillan Publishing Company, 1990), 114; Shapiro, “Clear and Present Danger,” 114 - 115; Lewis, *Freedom for the Thought That We Hate*, 34.

that the free-speech clause of the First Amendment applies to the states as a result of the Fourteenth Amendment. Justice Sanford explained:

For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States.⁶⁹

Justice Holmes and Justice Brandeis dissented, but agreed that the First Amendment ought to apply to the states. In addition, the court also recognized that the First Amendment applies to all branches of the government, not just the legislative branch. From this point on, cases dealing with freedom of speech generally were based on state repression.⁷⁰

Development of Freedom of Thought

For the remainder of this enquiry, recognizing that freedom of thought is fundamental to freedom of speech, the terms are used interchangeably. Important arguments for the cause of freedom of thought occurred in both *Whitney v. California* (1927) and *United States v. Schwimmer* (1929). In *Whitney*, Justice Brandeis issued a concurring opinion explaining the importance the Founders placed on freedom of thought:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an ends and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that *the freedom to think as you will and to speak as you think* [emphasis added] are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion

⁶⁹ Lewis, *Freedom for the Thought That We Hate*, 34 -35; *Gitlow v. People of New York*, 268 U.S. 652 (1925).

⁷⁰ Lewis, *Freedom for the Thought That We Hate*, 35; Emerson, “Freedom of Speech,” 20.

affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁷¹

In *Schwimmer*, the dissenting opinion authored by Justice Holmes further supports freedom of thought. Justice Holmes explained:

but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate. I think we should adhere to that principle with regard to admission into, as well as to life within this country.⁷²

The opinions in both cases illustrate the importance of freedom of thought for freedom of speech.

Freedom of Thought Decisions

The first time that the principle of freedom of speech supporting freedom of thought was enforced on the Supreme Court was in 1931 in the case of *Stromberg v. California*. Stromberg was convicted of violating a California law for displaying a red flag which was used as symbolic protest against the government. In a 7 - 2 opinion, the Supreme Court reversed the decision of the state appellate court that found for the state. Justice Hughes wrote:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is

⁷¹ *Whitney v. California*, 274 U.S. 357 (1927).

⁷² *United States v. Schwimmer*, 279 U.S. 644 (1929).

repugnant to the guaranty of liberty contained in the Fourteenth Amendment.⁷³

The clear and present danger doctrine overtook the bad tendency test starting a trend in which the Supreme Court consistently issued opinions favoring freedom of thought.

It is important to illustrate this trend through the legal opinion of some of the prominent cases from this period. In 1937 the court issued opinions in two cases stemming primarily from fear of Communism. In the first case, *De Jonge v. Oregon*, the defendant was convicted of violating a state syndicalism law by conducting a meeting sponsored by the Communist Party. Justice Hughes issued the majority opinion overturning the conviction.

Justice Hughes explained:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.⁷⁴

In the second case, *Herndon v. Lowry*, the defendant was convicted of attempting to incite resurrection through the Communist Party. Justice Roberts issued the opinion explaining, “The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its

⁷³ *Stromberg v. California*, 283 U.S. 359 (1931).

⁷⁴ *De Jonge v. Oregon*, 299 U.S. 353 (1937).

justification in a reasonable apprehension of danger to organized government.”⁷⁵ Both cases provided further justification for freedom of thought.

The Court continued advocating a clear role for freedom of thought in American society in the case of *Cantwell v. Connecticut* (1940). This involved the arrest of several members of the Jehovah’s Witnesses religion. They were going door to door in a Catholic neighborhood distributing information. Justice Roberts, illustrating the importance of freedom of thought, noted in his opinion that the First Amendment, “embraces two concepts, – freedom to believe and freedom to act. The first is absolute.”⁷⁶

A landmark 1943 United States Supreme Court decision, *West Virginia v. Barnette*, illustrates the importance of freedom of thought for freedom of speech. This case involved students who were expelled from school for refusing to salute the flag. Justice Jackson, writing for the majority explained:

One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.⁷⁷

During the 1950s, the clear and present danger doctrine would be amended to a clear and probable danger standard favoring a balancing test to determine the constitutionality of speech/thought.

⁷⁵ *Herndon v. Lowry*, 301 U.S. 242 (1937).

⁷⁶ *Cantwell et al. v. Connecticut*, 310 U.S. 296 (1940).

⁷⁷ *West Virginia v. Barnette*.

Balancing Test

During what historians often refer to as the Second Red Scare, clear and present danger would be abandoned in favor of a balancing test. The balancing test recognizes the protections under the First Amendment are not absolute. In *Dennis v. United States* (1951) the court decided that the interests of national security outweighed those of freedom of speech. Justice Frankfurter issued a concurring opinion explaining:

It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation . . . In the light of their experience, the Framers of the Constitution chose to keep the judiciary dissociated from direct participation in the legislative process . . . When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional.⁷⁸

Justice Frankfurter concluded that it was legitimate for Congress to conclude that national security was more important than protecting speech/thought in this particular situation.

On the other hand, in *Yates v. United States* (1957), the Supreme Court drew the line on the other side, supporting freedom of speech/thought over national security. Justice Harlan composed the majority opinion arguing that the District Court misinterpreted *Dennis*. Justice Harlan explains, “In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken as some

⁷⁸ Martin Shapiro, “Balancing Test,” in *The First Amendment: Selections from the Encyclopedia of the American Constitution*, ed. Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney (New York, NY: Macmillan Publishing Company, 1990), 66 - 67; *Dennis et al. v. United States*, 341 U.S. 494 (1951).

future time was enough.”⁷⁹ The Court’s use of the balancing test in this case distinguished between the “advocacy of abstract doctrine and advocacy of action.”⁸⁰ Contemporary United States Supreme Court decisions seem to have settled on the “Brandenburg test” with respect to freedom of speech/thought cases.

Brandenburg Test

The current test used to determine the constitutionality of speech/thought, the Brandenburg test, was established in the landmark 1969 United States Supreme Court case *Brandenburg v. Ohio*.⁸¹ The defendant was a leader of the area Ku Klux Klan and convicted of violating an Ohio syndicalism law resulting from a speech the defendant made later aired on a television news program. The United States Supreme Court issued an unusual per curiam opinion and overturned the conviction. The opinion explained:

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.⁸²

The Brandenburg test is a two-prong test. In order to suppress speech, it is not enough that the speech incites criminal activity, the speech must also be likely to produce the said action. When considering whether contemporary freedom of speech/thought ought to be suppressed,

⁷⁹ *Yates et al. v. United States*, 354 U.S. 298 (1957).

⁸⁰ *Yates*.

⁸¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁸² *Brandenburg v. Ohio*.

it is instructive to consider the requirements of the Brandenburg test since it appears that the United States Supreme Court has settled on this test.

Summary

In this chapter a historical analysis of freedom of thought was presented. The chapter began with the purpose of American public education and the connection between freedom of thought and freedom of speech. Four different rationales for freedom of speech were discussed including the argument from the perspective of truth, the argument from the perspective of democracy, the argument for the good life, and the argument for individuality. The history of freedom of thought was discussed from Ancient Greece to the Brandenburg test. For the purposes of this enquiry the ideal of freedom of thought and freedom of speech will be based on the above mentioned Brandenburg test.

Chapter 3

Political Judgement from Protagoras to Locke

The faculty of judging; ability to form an opinion; that function of the mind whereby it arrives at a notion of anything; the critical faculty; discernment.¹

-Oxford English Dictionary

Introduction

The purpose of this chapter is to further provide the context necessary to understand this Critical Enquiry. This Critical Enquiry is concerned with whether the practice of government mandated standardized achievement tests of knowledge in American public schools is consistent with the type of education necessary for citizens to exercise their right to freedom of thought in order to make informed political judgements. The following two chapters are a survey of the history of political judgement. Political judgement from Protagoras to Locke is discussed in this chapter and political judgement from Montesquieu to Rawls is discussed in Chapter 4.

Protagoras

Protagoras (ca. 490 - ca. 420 BCE) is arguably the most well known of the Sophists. The Sophists were Greek philosophers who charged a fee to educate citizens on a wide

¹ *Oxford English Dictionary*, 2nd ed., s.v. "Judgement."

variety of topics. Aside from a few quotations, little of the work of Protagoras has stood the test of time.² His most famous quote, from his work referred to as “Truth” or “Throws,” and referenced in Plato’s *Theaetetus* is, “Man is the measure of all things: of the things which are, that they are, and of the things which are not, that they are not.”³ Protagoras believed that all truths are internal and that there is no such thing as an objective reality. Political judgement, for Protagoras, rests entirely with each and every individual. Plato delineates a system of political judgement completely opposite from Protagoras in that “Truth” is outside of the individual.

Plato

Plato (427 - 347 BCE), an Athenian philosopher who studied under Socrates (469 - 399 BCE), composed numerous works on a variety of subjects. Many were written in a dialogue in which Socrates was the central character. Plato eventually founded the Academy, a school devoted to philosophy, in which his most famous student, Aristotle (384 - 322 BCE), studied.⁴ Plato’s three major political philosophical works are the *Republic*,⁵ the *Statesman*,⁶ and the *Laws*.⁷ In Plato’s *Republic*, Socrates discusses political judgement while

² Much of what is known about Protagoras comes from Plato.

³ *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. “Sophists;” Plato, *Theaetetus*, in *Complete Works*, ed. John M. Cooper and D.S. Hutchinson (Indianapolis, IN: Hackett Publishing Company, 1997) 152a.

⁴ *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. “Plato,” “Socrates.”

⁵ Plato, *Republic*, in *Complete Works*, ed. John M. Cooper and D.S. Hutchinson (Indianapolis, IN: Hackett Publishing Company, 1997).

⁶ Plato, *Statesman*, in *Complete Works*, ed. John M. Cooper and D.S. Hutchinson, trans. C. J. Rowe (Indianapolis, IN: Hackett Publishing Company, 1997).

⁷ Plato, *Laws*, in *Complete Works*, ed. John M. Cooper and D.S. Hutchinson (Indianapolis, IN: Hackett Publishing Company, 1997).

contemplating the notion of justice. Socrates locates political judgement during a discussion of the four virtues which are wisdom, civic courage, moderation, and justice. Positioning judgement in the realm of wisdom, Socrates notes that, “good judgment, is clearly some kind of knowledge, for it’s through knowledge, not ignorance, that people judge well.”⁸ This power to judge, in Socrates’s ideal city, rests with a minority at the top of the social hierarchy referred to as the guardians. Socrates notes that the guardians, “must eagerly pursue what is advantageous to the city and be wholly unwilling to do the opposite.”⁹ By acting as judge, the guardians must issue political judgements that are just, which for Socrates means, “that no citizen should have what belongs to another or be deprived of what is his own.”¹⁰ It is necessary to note that Socrates believes that justice, under the virtue of wisdom, is based on knowledge not opinion.¹¹ The Athenian, in the *Laws*, best explains the importance of knowledge arguing, “Knowledge is unsurpassed by any law or regulation; reason, if it is genuine and really enjoys its natural freedom, should have universal power.”¹²

Similar to Socrates, in the *Republic*, the Visitor, in the *Statesman*, argues that the best form of government necessitates a ruler that holds expert knowledge and is above the law.¹³ Political judgement rests with this expert statesman. The Visitor explains, “for wise rulers, whatever they do, provided that they watch for one great thing, that by always distributing

⁸ Plato, *Republic*, 428a - 430d.

⁹ Plato, *Republic*, 412e.

¹⁰ Plato, *Republic*, 433e.

¹¹ Plato, *Republic*, 480a.

¹² Plato, *Laws*, 875c - 875d.

¹³ Plato, *Statesman*, 293c, 300c - 300d.

to those in the city what is most just, as judged by the intelligent application of their expertise.”¹⁴ The Athenian, consistent with both the Visitor and Socrates, points out, “where supreme power in a man joins hands with wise judgment and self-restraint, there you have the birth of the best political system.”¹⁵ In order to exercise the position of ruler, both Socrates and the Athenian discuss the importance of education. Socrates believes that this education system should eliminate any possible exposure to injustice and the Athenian believes this education system should be based on virtue in the hope of creating the ideal citizen.¹⁶ The Athenian notes, “education has proved to be a process of attraction, of leading children to accept right principles as enunciated by the law and endorsed as genuinely correct by men who have high moral standards and are full of years and experience.”¹⁷

Practically, Socrates is skeptical that this ideal city could come to fruition. Socrates notes that it will not occur, “Until philosophers rule as kings or those who are now called kings and leading men genuinely and adequately philosophize, that is, until political power and philosophy entirely coincide.”¹⁸ He describes the philosopher king as, “A noble and well brought-up character, for example, kept down by exile, who remains with philosophy according to his nature because there is no one to corrupt him, or a great soul living in a small city, who disdains the city’s affairs and looks beyond them.”¹⁹ Socrates distinguishes

¹⁴ Plato, *Statesman*, 297a - 297b.

¹⁵ Plato, *Laws*, 712a.

¹⁶ Plato, *Republic*, 376d - 412b; Plato, *Laws*, 643e.

¹⁷ Plato, *Laws*, 659d.

¹⁸ Plato, *Republic*, 473c - 473d.

¹⁹ Plato, *Republic*, 496a - 496b.

between knowledge and opinion creating a four-level hierarchy that correlates to the four levels of the soul. These include, from the bottom up, imagination, belief, thought, and understanding. It is only the philosopher kings that are able to apprehend truth at its highest form, the good.²⁰ Socrates describes this acquisition through the well-known allegory of the cave.

In order to recognize where Plato situates political judgement, it is important to revisit his allegory of the cave. In this story Socrates paints the picture of a group of chained prisoners living in a cave since they were young and unable to move their heads. A fire behind them, that they are unable to see, projects shadows on the wall in front of them. The humans assume that the shadows are the truth. Socrates continues by imagining that one of the prisoners was able to escape from the cave and see the real truth. He uses this story as a metaphor for the education necessary for a philosopher king, culminating with the highest form of truth, the good, learned through dialectic. The philosopher king must then metaphorically travel back into the cave in order to rule the prisoners since they are the only one that possesses truth. Socrates explains that the philosopher king will:

see vastly better than the people [prisoners] there. And because you've [philosopher king] seen the truth about fine, just, and good things, you'll [philosopher king] know each image for what it is and also that of which it is the image. Thus, for you and for us, the city will be governed, not like the majority of cities nowadays, by people who fight over shadows and struggle against one another in order to rule—as if that were a great good—but by people who are awake rather than dreaming.²¹

²⁰ Plato, *Republic*, 477d - 478a, 508d - 508e, 511d - 511e.

²¹ Plato, *Republic*, 514a - 520c, 533c - 533d.

The allegory of the cave is consistent with the perspective of the Athenian when he argues that the people must constantly be ruled by someone and never make any individual decision.²² The Athenian says, “trust whatever the legislator tells us . . . the most respectable ideas will be those of the legislator.”²³ Departing from political judgement based on knowledge is Aristotle.

Aristotle

Aristotle (384 - 322 BCE), a Greek philosopher, initially studied under Plato at the Academy. At one time he tutored Alexander the Great before founding the Lyceum, his own school devoted to the study of philosophy.²⁴ Considering political judgement to be part of the practical sciences, and as a result the inability to positively establish the truth of politics, Aristotle’s viewpoint in his *Nicomachean Ethics*²⁵ is in sharp contrast to Plato’s notion of political judgement based strictly on knowledge. Politics, for Aristotle, involves striving for happiness. Aristotle describes someone who has achieved happiness as, “one who exercises his faculties in accordance with perfect excellence [virtue], being duly furnished with external goods, not for any chance time, but for a full term of years . . . and who shall continue to live so, and shall die as he lived.”²⁶ The individual who has achieved happiness is consistent with Aristotle’s notion of the ideal statesman interested in virtue.²⁷

²² Plato, *Laws*, 942a - 942d.

²³ Plato, *Laws*, 959a, 959d.

²⁴ *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. “Aristotle.”

²⁵ Aristotle, *Nicomachean Ethics*, trans. F. H. Peters (New York, NY: Barnes & Noble, 2004).

²⁶ Aristotle, *Ethics*, 1094b, 1095a, 1101a.

²⁷ Aristotle, *Ethics*, 1102a.

Aristotle defines virtue as, “a habit or trained faculty of choice, the characteristic of which lies in moderation or observance of the mean relatively to the persons concerned, as determined by reason, i.e., by the reason by which the prudent man would determine it.”²⁸ This determination, or deliberation for Aristotle involves, “matters in which there are rules that generally hold good, but in which the result cannot be predicted, i.e., in which there is an element of uncertainty. In important matters we call in advisers, distrusting our own powers of judgment.”²⁹ Aristotle notes, “for the good or ideal man judges each case correctly, and in each case what is true seems true to him.”³⁰ The criteria to determine judgement is justice. Justice consists of being fair and consistent with the law. But Aristotle does not necessarily believe that the law is absolute, rather it is signified in generalities and does not necessarily fit each individual case. It is then the role of the judge to make a political judgement based on the notion of justice.³¹

In order to make the right judgement, according to Aristotle, the judge must have both superior moral and intellectual virtue. This requires prudence since this virtue involves the realm of opinion. Aristotle discusses the importance of prudence for judgement noting that prudence:

deals with human affairs, and with matters that admit of deliberation: for the prudent man’s special function, as we conceive it, is to deliberate well; but no one deliberates about what is invariable, or about matters in which there is not some end, in the sense of some realizable good. But a man is said to

²⁸ Aristotle, *Ethics*, 1107a.

²⁹ Aristotle, *Ethics*, 1112b.

³⁰ Aristotle, *Ethics*, 1113a.

³¹ Aristotle, *Ethics*, 1129a, 1132a, 1137b.

deliberate well (without any qualifying epithet) when he is able, by a process of reasoning or calculation, to arrive at what is best for man in matters of practice.³²

In *Politics*,³³ Aristotle discusses three major types of government, but unlike Plato, Aristotle does not profess which type of government makes the ideal state.

Aristotle distinguishes forms of government based on how many govern. These include a kingship in which one rules, an aristocracy in which a few rule, and a constitutional government in which many rule. Consistent with Aristotle's position in *Nicomachean Ethics*, the ideal city, like the ideal man, should be virtuous. As a result, Aristotle believes that the best city has a majority of citizens from the middle class to prevent either extreme, the rich or the poor, from dominating. Aristotle describes the virtuous state as:

the happy state may be shown to be that which is best and which acts rightly: and it cannot act rightly without doing right actions, and neither individual nor state can do right actions without excellence and wisdom. Thus the courage, justice, and wisdom of a state have the same form and nature as the qualities which give the individual who possesses them the name of just, wise, or temperate.³⁴

As a result, for Aristotle, the ideal state best ensures that each citizen is able to pursue happiness.³⁵

Not all individuals in the state are considered citizens. Classes of individuals excluded include artisans and tradesmen since they have no deliberative role in the

³² Aristotle, *Ethics*, 1139b, 1140b, 1141b.

³³ Aristotle, *Politics*, in *The Complete Works of Aristotle: The Revised Oxford Translation*, ed. Jonathan Barnes, vol. 2 (Princeton, NJ: Princeton University Press, 1984).

³⁴ Aristotle, *Politics*, 1279a - 1279b, 1295a - 1295b, 1323b.

³⁵ Aristotle, *Politics*, 1324a.

government. For Aristotle, only the citizens should own land and take part in the decision making apparatus of government. To ensure that citizens possess the intellectual and moral virtue, discussed above, necessary to make appropriate judgements, Aristotle argues that citizens should be provided an education designed to support the particular form of government in place.³⁶ Moving away from Aristotle and back towards an absolute notion of judgement is Marcus Tullius Cicero.

Cicero

Cicero (106 - 43 BCE), a Roman politician, was most famous for bringing the Hellenistic philosophy of Plato and Aristotle, among others, to a Latin audience.³⁷ Cicero's two major political works are the *Republic* and the *Laws*. In the dialogue of the *Republic*,³⁸ Cicero uses Scipio Africanus, a historical Roman statesman, as the major character discussing the ideal type of government. Scipio distinguishes between three simple forms of government. These include a monarchy, an aristocracy, and a democracy. Scipio, disliking all three simple forms of government, describes the general change in political power as, "Tyrants snatch it from kings; aristocrats or the people wrest it from them; and from them it moves to oligarchic cliques or back to tyrants. The same type of constitution never retains power for long."³⁹ When pressed, Scipio believes that of those three forms of government the monarchy is the best, but Scipio argues that the best form of government is

³⁶ Aristotle, *Politics*, 1275b, 1328b, 1329a - 1329b, 1337a.

³⁷ *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Cicero, Marcus Tullius."

³⁸ Cicero, *Republic*, in *The Republic and the Laws*, trans. Niall Rudd (New York, NY: Oxford University Press, 1998), Kindle edition.

³⁹ Cicero, *Republic*, 19 - 21, 32.

a combination of the three simple forms of government. Scipio describes this ideal state as, “A state should possess an element of regal supremacy; something else should be assigned and allotted to the authority of aristocrats; and certain affairs should be reserved for the judgement and desires of the masses.”⁴⁰ While it seems that Cicero, based on the ideas of Scipio, believes that ideal political judgement varies since he believes in a mixed government, the *Laws*⁴¹ illustrates a view of political judgement must more consistent with Plato.

Cicero defines his notion of the law. Cicero says, “law is a force of nature, the intelligence and reason of a wise man, and the criterion of justice and injustice.”⁴² Cicero believes that justice is not based in the practical realm of opinion, but based exclusively on nature, a position much more consistent with Plato and his ideal forms. Cicero describes justice:

There is one, single, justice. It binds together human society and has been established by one, single law. That law is right reason in commanding and forbidding. A man who does not acknowledge this law is unjust, whether it has been written down anywhere or not. . . . That is why justice is completely non-existent if it is not derived from nature.”⁴³

Nature is what enables one to distinguish good from bad, justice from injustice, and what is honorable from what is dishonorable. Cicero further notes that nature implants this understanding of virtue and vice into the minds of humans. Cicero explains, “law was not

⁴⁰ Cicero, *Republic*, 21, 25, 31 - 32.

⁴¹ Cicero, *Laws*, in *The Republic and the Laws*, trans. Niall Rudd (New York, NY: Oxford University Press, 1998), Kindle edition.

⁴² Cicero, *Laws*, 103.

⁴³ Cicero, *Laws*, 107, 112.

thought up by the intelligence of human beings, nor is it some kind of resolution passed by communities, but rather an eternal force which rules the world by the wisdom of its commands and prohibitions.”⁴⁴ Cicero explains that it is the wise man who has developed the reason necessary to establish the law based on nature.⁴⁵ Similar to Cicero’s notion of judgement, but aligned with the Christian religious tradition is Augustine.

Augustine

Augustine (354 - 430 CE), bishop of Hippo and Christian theologian, was significant in that he was the first to combine, with numerous modifications, the Greek philosophy of Plato with the Christian religion.⁴⁶ Augustine differentiates between the spiritual and material world in *The City of God*⁴⁷ illustrating a political judgement based on the divine judgement of God. Augustine distinguishes in the text between the city of man and the city of God, in which justice only exists in the later. In a rebuke to the Greek philosophers, Augustine argues that it is only through divine assistance that the truth can be discovered. He also explains, “the whole connection and train of causes which makes everything become what it does become . . . the will and power of God most high, who is most rightly and most truly believed to know all things before they come to pass, and to leave nothing unordained.”⁴⁸ In the political philosophy of Augustine, all truth rests outside of humanity

⁴⁴ Cicero, *Laws*, 112, 124.

⁴⁵ Cicero, *Laws*, 125.

⁴⁶ Leo Strauss and Joseph Cropsey, ed., *History of Political Philosophy*, 3rd ed. (Chicago, IL: The University of Chicago Press, 1987), 176.

⁴⁷ Augustine, *The City of God*, trans. Marcus Dods (Peabody, MA: Hendrickson Publishers, 2010).

⁴⁸ Augustine, *City of God*, 42, 57, 135.

in the divine realm of God and is more just and wise than anything that could be created in the human world.⁴⁹

While Augustine challenges many of the ideas of Greek philosophy, he is partial to the work of Plato and believes that many of the ideas of Plato are consistent with the notion of God. He describes Plato and philosophers consistent with Plato as, “these, by knowing God, have found where resides the cause by which the universe has been constituted, and the light by which truth is to be discovered, and the fountain at which felicity is to be drunk.”⁵⁰ Augustine, consistent with Plato, in that political judgement is based on knowledge, argues that man ought to live a life according to the spiritual and not the material in order live the life of truth based on faith.

Ultimate judgement rests with God, according to Augustine. He explains the position of the church with respect to judgement:

the whole church of the true God holds and professes as its creed, that Christ shall come from heaven to judge quick and dead, this we call the last day, or last time of divine judgement. . . . even now God judges, and has judged from the beginning of human history . . . but he also judges the voluntary and personal acts of individuals⁵¹

In a sense, judgement under Augustine is non-existent, the only place judgement rests is with God. According to Augustine, God’s judgement will occur both in the human world and the spiritual world.⁵² Augustine notes that God possesses the greatest wisdom, virtue, and justice

⁴⁹ Augustine, *Political Writings*, ed. E. M. Atkins and R. J. Dodaro (Cambridge, England: Cambridge University Press, 2007), 17.

⁵⁰ Augustine, *City of God*, 221, 226, 228.

⁵¹ Augustine, *City of God*, 401, 611, 641 - 642.

⁵² Augustine, *Political Writings*, 16.

and that all of God's judgements are just.⁵³ Another important Christian theologian, albeit one who privileges Aristotle instead of Plato, is Thomas Aquinas.

Thomas Aquinas

Aquinas (1225 - 1274 CE), like Augustine, attempted to unite philosophy and theology. The major significance in the work of Aquinas is the establishment of a Aristotelean philosophy in the Christian West.⁵⁴ In Aquinas's work, *On Kingship*,⁵⁵ he follows the Aristotelean practice of distinguishing between theory and practice in his discussion of a monarch. Aquinas begins by describing humans as "social and political animals" who need to be directed as a group to a "common good" by some type of government.⁵⁶ The most just type of government, according to Aquinas, is that of the king, the most unjust type of government is that of the tyrant. He describes the king as, "one man who is chief and that he be a shepherd seeking the common good of the multitude and not his own."⁵⁷ While it initially seems that Aquinas believes that political judgement rests with the king, further inspection leads to a different conclusion.

Aquinas later describes the king as a servant to God in his rule over the people. The reward for the king is not presented in the material world, but in heaven for eternity. This provides the incentive for the king to ensure that he is ruling justly and not as a tyrant.

⁵³ Augustine, *City of God*, 643.

⁵⁴ Strauss and Cropsey, 248.

⁵⁵ Thomas Aquinas, *On Kingship: To the King of Cyprus*, trans. Gerald B. Phelan (Toronto, Ontario: Pontifical Institute of Mediaeval Studies, 1949).

⁵⁶ Aquinas, *On Kingship*, 3 - 5, 7.

⁵⁷ Aquinas, *On Kingship*, 7 - 9.

Aquinas denotes the role of the king as, “first of all, to establish a virtuous life in the multitude subject to him; second, to preserve it once established; and third, having preserved it, to promote its greater perfection.”⁵⁸ And in order to ensure that the king is consistent with his role as a servant of God, Aquinas argues that the king ought to be subservient to the priests.⁵⁹ As a result, political judgement is not based in the material world, but is based outside of humanity.

For Aquinas, it would be impossible for political judgement to be housed with the king, since the king is not subject to the full understanding of what constitutes truth. Absolute knowledge can only be known by God. Aquinas describes truth as, “God’s justice, which establishes things in the order conformable to the rule of His wisdom, which is the law of His justice.”⁶⁰ God is necessary in the realm of political judgement because humans lack the ability to form exact judgements. Aquinas explains:

on account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err.⁶¹

In the end, according to Aquinas, all judgement, including political judgement, rests with God when he conducts the last judgement in which both the body and soul are judged for

⁵⁸ Aquinas, *On Kingship*, 34 - 35, 43, 65.

⁵⁹ Aquinas, *On Kingship*, 63.

⁶⁰ Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province, electronically developed by Coyote Canyon Press, Kindle edition, location 403, 2992, 4754.

⁶¹ Aquinas, *Summa Theologica*, location 37298.

eternity.⁶² This survey continues with a look at Niccolò Machiavelli and a political judgement based on practice.

Niccolò Machiavelli

Machiavelli (1469 - 1527 CE), an Italian political philosopher, is most readily identified for his classic text *The Prince*.⁶³ In it, Machiavelli recognizes two basic forms of government. A state is either governed as a principality, the focus of *The Prince*, or a republic. In his famous book, Machiavelli describes the “science” of how to rule a state. The most important aspect of managing a state is being able to conduct a war. According to Machiavelli, this should be the chief focus of any successful ruler. The maintenance of the state is the criteria used to determine the successful prince. While the prince ought to listen to advisors, political judgement rests solely with the ruler. Machiavelli, while still recognizing the divine, moves away from Aquinas arguing that man can govern and that not everything is determined by God.⁶⁴ The above account represents the traditional and contemporary understanding of “Machiavellian” politics, but further reading presents a different account of political judgement.

Machiavelli presents a republican form of political judgement in *The Discourses*.⁶⁵ Essentially, a republican form of government, consists of mixing the various other types of

⁶² Thomas Aquinas, *Summa Contra Gentiles*, Kindle edition, location 17873.

⁶³ Niccolò Machiavelli, *The Prince*, 2nd ed., trans. Harvey C. Mansfield (Chicago, IL: The University of Chicago Press, 1998).

⁶⁴ Machiavelli, *The Prince*, 5, 58 - 59, 71, 94 - 95, 98.

⁶⁵ Niccolò Machiavelli, *The Discourses*, ed. Bernard Crick, (London, England: Penguin Books, 2003), 15.

government. These other governments include a principality, an aristocracy, and a democracy. As a result, the three basic parts of a republican government are a regal power, an elite influence, and a popular government. Combining all three elements creates a more stable government, according to Machiavelli. He also notes that a government is much more stable when the citizens consent to it and are religious since they then possess virtue. Machiavelli explains the importance of different governmental elements at different times. He argues that while democratic institutions are critical to a healthy republic, there are times where it is necessary to have some type of power authorized to make quick and appropriate decisions.⁶⁶

Machiavelli, in sharp contrast to popular opinion,⁶⁷ supports a republic over a principality. He argues, “For when the populace is in power and is well-ordered, it will be stable, prudent and grateful, in much the same way, or in a better way, than is a prince, however wise he be thought. . . . It is found, too, that in the election of magistrates the populace makes a far better choice than does the prince.”⁶⁸ Political judgement, for

⁶⁶ Machiavelli, *The Discourses*, 27, 31, 35, 109, 111, 141, 143, 195.

⁶⁷ Michel Foucault offers an alternative interpretation, developing the notion of *governmentality*, by analyzing literature written in response to Machiavelli’s *The Prince*. Foucault describes *governmentality* as, “1. The ensemble formed by the institutions, procedures, analyses, and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security. 2. The tendency that, over a long period and throughout the West, has steadily led toward the preeminence over all other forms (sovereignty, discipline, and so on) of this type of power—which may be termed ‘government’—resulting, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of knowledges [*savoirs*]. 3. The process or, rather, the result of the process through which the state of justice of the Middle Ages transformed into the administrative state during the fifteenth and sixteenth centuries and gradually becomes ‘governmentalized.’” For more information see, Michel Foucault, *Governmentality*, in *Power*, ed. James D. Faubion, trans. Robert Hurley and Others (New York, NY: The New Press, 2000), 219 - 220.

⁶⁸ Machiavelli, *The Discourses*, 254 - 255.

Machiavelli, depends on the situation at hand. It is neither located absolutely in nature, the divine or in the hands of the king, but also in the hands of everyday people. For Machiavelli, politics is much more a practice than a theory. The next philosopher, Francis Bacon, argues that political judgement ought to be based on science.

Francis Bacon

Bacon (1561 - 1626 CE) was an English philosopher who privileged science in his search for truth. His empiricism is developed in *New Atlantis*,⁶⁹ a utopian novel that concludes with political judgement in the state ultimately being based on scientific research. Bacon begins the story describing a ship that was lost at sea that encounters a previously unknown island called Bensalem. Initially, the island's inhabitants refused to allow the crew to land; but after taking an oath, the crew was permitted on land and escorted to what was called the Strangers' House for an initial quarantine. During this quarantine, the crew conversed with several village leaders. Of particular importance was the discussion of Salomon's House with the Father of Salomon's House.⁷⁰

Salomon's House was established as an institution for the study of the world with the explicit purpose of "finding out of the true nature of all things."⁷¹ Operations of Salomon's House include launching expeditions to states throughout the world in order to bring back various books of knowledge, compiling the new knowledge, conducting experiments,

⁶⁹ Francis Bacon, *New Atlantis*, in *Works of Francis Bacon*, electronically developed by MobileReference, Kindle edition.

⁷⁰ Bacon, *New Atlantis*, location 3286 - 3537.

⁷¹ Bacon, *New Atlantis*, location 3537 - 3550.

analyzing the results of experiments, synthesizing the results of experiments, and amending experiments based on the results. The Father of Salomon's House notes:

we have consultations, which of the inventions and experiences which we have discovered shall be published, and which not: and take all an oath of secrecy, for the concealing of those which we think fit to keep secret: though some of those we do reveal sometimes to the state and some not.⁷²

Essentially, Saloman's House conducts scientific research and controls the dissemination of information. As a result, political judgement rests with this group since the government is subservient to Saloman's House due to the restrictive nature of knowledge on the island. Political judgement moves back from science to the sole control of a monarch with Thomas Hobbes.

Thomas Hobbes

Hobbes (1588 - 1679 CE) was an English philosopher. In his major work of political philosophy, the *Leviathan*,⁷³ Hobbes describes man in a hypothetical original state of nature before the creation of the state. Hobbes describes man in this state as equal to every other man, but at the same time living in constant fear of each other. Hobbes describes the state of nature as:

where every man is enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withal. In such condition, there is no place for industry; because the fruit thereof is uncertain; and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things as requires much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst

⁷² Bacon, *New Atlantis*, location 3824 - 3836.

⁷³ Thomas Hobbes, *Leviathan*, ed. J. C. A. Gaskin, (Oxford, England: Oxford University Press, 1996).

of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.⁷⁴

Hobbes continues by explaining that in the state of nature, concepts such as morality and ethics do not exist since there is no law.⁷⁵ Since it is impossible to have any semblance of peace in the original state of nature, Hobbes formulates the notion of the social contract.

Through the social contract, men abandon all of their individual rights absolutely. The state is created in order to ensure that men keep to their agreement and provide for the safety of the people. Hobbes explains, “the nature of justice, consisteth in keeping of valid covenants: but the validity of covenants begins not but with the constitution of a civil power, sufficient to compel men to keep them.”⁷⁶ Hobbes favors a monarch to ensure the effectiveness of the social contract. He explains, “The only way to erect such a common power . . . is, to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will.”⁷⁷ Advantages of a monarch, according to Hobbes, include the alignment of both private and public interests, the ability to confer with others at leisure, and the lack of disagreement between faring factions based on self-interest. Also, since the monarch has sole power in determining a successor, power can be transferred without issue. In addition, Hobbes argues that the people, once making the social contract, have no right to abandon the agreement.⁷⁸

⁷⁴ Hobbes, *Leviathan*, 82 - 84.

⁷⁵ Hobbes, *Leviathan*, 85.

⁷⁶ Hobbes, *Leviathan*, 86 - 96, 222.

⁷⁷ Hobbes, *Leviathan*, 114.

⁷⁸ Hobbes, *Leviathan*, 115, 124 - 125, 130.

In this form of government, all political judgement rests with the sovereign monarch.

Hobbes summarizes the power of the monarch as:

His power cannot, without his consent, be transferred to another: he cannot forfeit it: he cannot be accused by any of his subjects, of injury: he cannot be punished by them: he is judge of what is necessary for peace; and judge of doctrines: he is sole legislator; and supreme judge of controversies; and of the times, and occasions of war, and peace: to him belongeth to choose magistrates, counsellors, commanders, and all other officers, and ministers; and to determine of rewards, and punishments, honor, and order.⁷⁹

Private judgement does not exist. Judgement rests solely and completely with the monarch.

Hobbes believes that although there might be negatives with respect to an absolute monarch, they are not anywhere close to the problems man experiences in the original state of nature.⁸⁰

René Descartes provides an entirely different notion of political judgement.

René Descartes

Descartes (1596 - 1650 CE), from France, was best known for his work in philosophy and mathematics. Descartes believes that one must start from first principles and then establish new knowledge based on it.⁸¹ Descartes, in *Discourse on Method*⁸² and *Meditations on First Philosophy*,⁸³ describes his methodology utilized in order to pursue truth. He begins by arguing that men have an equal capacity for judging the true from the false, but that some men do not use this ability appropriately. In addition, Descartes believes that most men form

⁷⁹ Hobbes, *Leviathan*, 132 - 133.

⁸⁰ Hobbes, *Leviathan*, 138, 214.

⁸¹ *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. "Descartes, René."

⁸² René Descartes, *Discourse on Method*, revised by Deena Weinberg, (United States: BN Publishing, 2007).

⁸³ René Descartes, *Meditations on First Philosophy*, revised by Deena Weinberg, (United States: BN Publishing, 2007).

opinion based on custom rather than knowledge. In an attempt to ascertain truth at the most basic level, Descartes, following in the tradition of the skeptics, attempts to determine truth at a foundational level and then to build from there.⁸⁴

As a firm foundation which Descartes does not believe can be denied, Descartes establishes as his basic truth, “I think, therefore I am (COGITO ERGO SUM).”⁸⁵ Descartes believes that it is impossible to doubt that he exists since he has a mind and is able to think. He continues by noting that since he can think of perfection, God must also exist. After arguing for the existence of God, Descartes establishes other truths outside of reality such as geometry.⁸⁶ From these basic truths, Descartes continues developing more complex truths.

Of particular importance is Descartes assertion that truth exists outside humans.

Descartes explains:

And what I here find of most importance is, that I discover in my mind innumerable ideas of certain objects . . . which are not framed by me though it may be in my power to think, or not to think them, but possess true and immutable natures of their own. As, for example, when I imagine a triangle, although there is not perhaps and never was in any place in the universe apart from my thought one such figure, it remains true nevertheless that this figure possesses a certain determinate nature, form, or essence, which is immutable and eternal, and not framed by me, nor in any degree dependent on my thought.⁸⁷

It is through reason that humans can determine what constitutes truth and, as a result, political judgement. Descartes notes, “all that is necessary to right action is right judgment,

⁸⁴ Descartes, *Discourse on Method*, 11, 20, 23; Descartes, *Meditations on First Philosophy*, 78 - 79.

⁸⁵ Descartes, *Discourse on Method*, 31.

⁸⁶ Descartes, *Discourse on Method*, 32 - 35; Descartes, *Meditations on First Philosophy*, 81 - 82, 96.

⁸⁷ Descartes, *Meditations on First Philosophy*, 111.

and to the best action the most correct judgment.”⁸⁸ The next philosopher, John Milton, combines an argument for both individual political judgement and freedom of speech.

John Milton

Milton (1608 - 1674 CE),⁸⁹ while best known for his poetry, contributed significantly to political philosophy. At base, Milton believes that political judgement rests with each and every citizen in the state. Milton argues that humans in the original state of nature were free until Adam committed the original sin. Afterwards, it became necessary for humans to join in groups, creating cities and nations, in order to protect themselves. A single individual or group of individuals were selected to ensure that justice was carried out. Milton believes that this should still hold true. Milton explains:

since the king or magistrate holds his authority of the people, both originally and naturally for their good in the first place, and not his own, then may the people, as oft as they shall judge it for the best, either choose him or reject him, retain him or depose him, though no tyrant, merely by the liberty and right of free-born men to be governed as seems to them best.⁹⁰

Milton continues, “justice is the only true sovereign and supreme majesty upon earth.”⁹¹ As a result, Milton supports a free commonwealth.

Milton believes that a free commonwealth is the best form of government as opposed to a monarch. In this type of government, the people have the duty to select a group to meet and make decisions for the good of the country. In order to ensure that citizens can make

⁸⁸ Descartes, *Discourse on Method*, 28.

⁸⁹ John Milton’s views on freedom of thought were discussed in Chapter 2.

⁹⁰ John Milton, *The Tenure of Kings and Magistrates*, in *The Major Works*, ed. Stephen Orgel and Jonathan Goldberg, (Oxford, England: Oxford University Press, 2003), 277 - 278, 281.

⁹¹ Milton, *Tenure of Kings and Magistrates*, 297.

those political judgements, Milton is a proponent of revising the education system.⁹² Political judgement, for Milton, rests with each individual. Benedict De Spinoza, the next philosopher, also supports political judgement resting with the individual.

Benedict De Spinoza

Spinoza (1632 - 1677 CE) was a Dutch philosopher and key theorist within the rationalist circle. Originally born Baruch, Spinoza opted for the Latin Benedict and was later excommunicated for his views which were deemed contrary to the Jewish faith.⁹³ In his *Theological-Political Treatise*,⁹⁴ Spinoza argues that philosophy and religion are two distinct groups of discourse. As a result, there is no dispute between them nor should one be dependent upon the other. Spinoza explains that the purpose of religion is to, “teach obedience [to the moral law] . . . It teaches that the entire Law consists in just one thing, namely love of one's neighbour.”⁹⁵ Philosophy, on the other hand, is concerned with truth.

Spinoza further explains:

anyone who tries to accommodate the Bible to philosophy will undoubtedly ascribe to the prophets many things that they did not imagine even in their dreams and will construe their meaning wrongly. On the other hand, anyone who makes reason and philosophy the servant of theology will be obliged to accept as divinely inspired the prejudices of the common people of antiquity

⁹² John Milton, *Of Education*, in *The Major Works*, ed. Stephen Orgel and Jonathan Goldberg, (Oxford: Oxford University Press, 2003), 229; John Milton, *The Ready and Easy Way to Establish a Free Commonwealth*, in *The Major Works*, ed. Stephen Orgel and Jonathan Goldberg, (Oxford: Oxford University Press, 2003), 335 - 339, 343.

⁹³ *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. “Plato,” “Spinoza, Baruch.”

⁹⁴ Benedict De Spinoza, *Theological-Political Treatise*, ed. Jonathan Israel, trans. Michael Silverthorne and Jonathan Israel (Cambridge, England: Cambridge University Press, 2007).

⁹⁵ Spinoza, *Theological-Political Treatise*, 10, 179.

and let his mind be taken over and clouded by them. Thus both will proceed senselessly, albeit the latter without reason and the former with it.⁹⁶

As a result, Spinoza makes the point, one can not use “mathematical proofs” to justify religion.

Spinoza argues that the best form of government is a democracy. He explains that in the original state of nature, before society, humans are not able to accomplish much since they are not able to work together. In addition, humans are ruled by emotions and not reason. Because of this it is beneficial to form a government and create laws to prevent humans from being dominated by their emotions. As a result, humans turn over their right to individual action, but not any right with respect to freedom of speech. The most important duty of the state is to protect the citizens and provide freedom. In a democracy, the sovereign is collective and the best laws are created based on reason.⁹⁷

Spinoza is also a supporter of freedom of speech and believes that this is a right which can not be handed over to the state absolutely, unless the state is to become unjust.

Spinoza explains:

No one, therefore, can surrender their freedom to judge and to think as they wish and everyone, by the supreme right of nature, remains master of their own thoughts. . . . Hence, a government which denies each person freedom to speak and to communicate what they think, will be a very violent government whereas a state where everyone is conceded this freedom will be moderate.⁹⁸

⁹⁶ Spinoza, *Theological-Political Treatise*, 184, 186.

⁹⁷ Spinoza, *Theological-Political Treatise*, 72 - 73, 196, 200 - 201, 242, 252.

⁹⁸ Spinoza, *Theological-Political Treatise*, 234, 251.

Political judgement rests with the individual since they ought never relinquish the right to freedom of speech. John Locke echoes a similar version of political judgement.

John Locke

Locke (1632 - 1704 CE)⁹⁹ is most famous for his work of political philosophy, *Two Treatises of Government*.¹⁰⁰ In this text, Locke portrays a positive painting, contrary to Hobbes, of humans in the original state of nature noting that it is both a “state of perfect freedom” and a “state also of equality.”¹⁰¹ Although man is free in the original state of nature, man also has to continually worry about protecting his rights since not everyone follows the same notion of justice. As a result, Locke believes that it is advantageous to leave the original state of nature and form a government in order to protect this freedom.

Locke explains:

Man being born, as has been proved, with a title to perfect freedom, and uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty, and estate, against the injuries and attempts of other men; but to judge of and punish the breaches of that law in others . . . But because no political society can be, nor subsist, without having in itself the power to preserve the property, and, in order thereunto, punish the offenses of all those of that society; there, and there only is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community . . . the community comes to be umpire . . . Those who are united into one body, and have a common established law and judicature to appeal to, with authority to

⁹⁹ John Locke’s views on freedom of thought were discussed in Chapter 2.

¹⁰⁰ John Locke, *Two Treatises of Government*, ed. Ian Shapiro (New Haven, CT: Yale University Press, 2003).

¹⁰¹ Locke, *Two Treatises of Government*, 101.

decide controversies between them, and punish offenders, are in civil society one with another.¹⁰²

Locke believes that a democracy is the best form of government to ensure that human freedom is protected.

In order to administer the government in accordance with the will of the majority and to ensure the continuation and good of the state, Locke argues for the creation of a legislative power and for this power to be supreme. He argues that the legislative power should be given to multiple citizens to ensure that the good of the state is considered and that everyone is treated equal under the law. In addition, Locke believes that an executive power should be created, separate from the legislative power, for the purpose of enforcing the laws and that a federative power should be created with the purpose of foreign relations.¹⁰³ While the legislative power is supreme within the government, the people are ultimately sovereign.

Locke believes that the people have a right, in some circumstances, to overthrow the government. Locke explains:

whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience, and are left to the common refuge, which God hath provided for all men, against force and violence. Whensoever therefore the legislative shall transgress this fundamental rule of society; and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a

¹⁰² Locke, *Two Treatises of Government*, 123 - 124, 136 - 137, 154 - 155.

¹⁰³ Locke, *Two Treatises of Government*, 142, 158 - 159, 163 - 166.

new legislative, (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society.¹⁰⁴

Locke refutes those who argue that states would be constantly under a state of rebellion. He argues that revolutions do not happen over little matters. Locke notes this will only happen when a “long train of abuses, prevarications, and artifices, all lending the same way, make the design visible to the people . . . that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected . . . the good of mankind.”¹⁰⁵ Locke’s notion of political judgement, while similar to Spinoza, extends farther by advocating that citizens have the right to overthrow the government in some circumstances.

Summary

This chapter is the first part of a two-chapter survey of the history of political judgement. Protagoras situates political judgement inside individuals. According to Plato, political judgement, based on knowledge, rests outside the individual. Aristotle, in a significant shift, situates political judgement within the realm of practical sciences and urges citizens to become virtuous in order to make appropriate judgements. Both Cicero and Augustine move political judgement back outside the individual with Cicero placing political judgement with the wise man and Augustine situating political judgement with God. Aquinas also places political judgement with God, but privileges Aristotle instead of Plato. Political judgement for Machiavelli depends on the situation and is a practical determination.

¹⁰⁴ Locke, *Two Treatises of Government*, 197.

¹⁰⁵ Locke, *Two Treatises of Government*, 199, 201.

Bacon privileges science in determining political judgement while Hobbes favors an absolute monarch. Descartes believes that reason can be used to determine truth and thus the appropriate political judgement. Milton, Spinoza, and Locke situate political judgement with the individual.

Chapter 4

Political Judgement from Montesquieu to Rawls

The formation of an opinion or notion concerning something by exercising the mind upon it; an opinion, estimate.¹

-Oxford English Dictionary

Introduction

The purpose of this Critical Enquiry is to examine whether the practice of government mandated standardized achievement tests of knowledge in American public schools is consistent with the type of education necessary for citizens to exercise their right to freedom of thought in order to make informed political judgements. As stated previously, this chapter is necessary to understand the contextual nature of this study. Chapter 3 was a survey of political judgement beginning with Protagoras and ending with Locke. This chapter continues the survey starting with Montesquieu and culminating with Rawls.

Baron de Montesquieu

Baron de Montesquieu (1689 - 1755 CE) was a French political philosopher most famous for his work, *The Spirit of the Laws*.² Montesquieu distinguishes between three

¹ *Oxford English Dictionary*, 2nd ed., s.v. "Judgement."

² Baron de Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (Digireads, 2010) Kindle edition.

different basic types of government. These include a republic, a monarch, and a despotic government. A republic can be further divided depending on whether the people are sovereign or whether a small group is sovereign. He refers to these governments as a democracy and an aristocracy respectively. Montesquieu believes that while all citizens are capable of exercising political judgement in order to select a representative, most citizens would not be qualified to actually serve as a representative. Virtue is the quality, for Montesquieu, that is necessary for a republic to function.³

Montesquieu defines virtue as “love of the laws and of our country” and believes that it is necessary for the education system to be focused primarily on virtue.⁴ Montesquieu explains the importance of this:

A love of the republic in a democracy is a love of the democracy; as the latter is that of equality. . . . Since every individual ought here to enjoy the same happiness and the same advantages, they should consequently taste the same pleasures and form the same hopes . . . The love of equality in a democracy limits ambition to the sole desire, to the sole happiness, of doing greater services to our country than the rest of our fellow-citizens. They cannot all render her equal services, but they all ought to serve her with equal alacrity. At our coming into the world, we contract an immense debt to our country, which we can never discharge.⁵

For Montesquieu, the important role of a citizen in a democracy is not to make every individual political judgement, but to determine those individuals that are capable of making

³ Montesquieu, *Spirit of the Laws*, location 560, 574, 630, 921.

⁴ Montesquieu, *Spirit of the Laws*, location 1201, 1340, 1548.

⁵ Montesquieu, *Spirit of the Laws*, location 1562.

appropriate political judgements.⁶ In addition, Montesquieu is especially concerned with protecting political liberty.

Montesquieu argues that political liberty only exists in governments that prevent power from being abused. He advocates separation of powers for this reason, dividing governmental power into three categories. These include legislative, executive, and judicial powers. In order to protect political liberty, it is necessary for different individuals or groups of individuals to only have power over one particular power. Montesquieu advocates for the legislative power to be composed of elected citizens chosen from all parts of the country to ensure that all interests are represented. The executive power ought to be in the hands of one person. Montesquieu also advocates for a system of checks and balances arguing that each of the three governmental powers ought to have some power over one another. This further prevents power from being abused.⁷ Political judgement, for Montesquieu, can only come about when power is not being abused. While all have some level of political judgement, the real power lies with the elected representative. David Hume, the next philosopher, explicitly argues that political judgement should rest with the upper class.

David Hume

Hume (1711 - 1776 CE), an empiricist, was a key figure in the Scottish Enlightenment. In *An Enquiry Concerning Human Understanding*,⁸ Hume privileges experience over reason. Dividing perceptions into two categories, ideas and impressions,

⁶ Montesquieu, *Spirit of the Laws*, location 3675.

⁷ Montesquieu, *Spirit of the Laws*, location 4823 - 5062.

⁸ David Hume, *An Enquiry Concerning Human Understanding*, ed. L. A. Selby-Bigge (1902) Kindle edition.

Hume defines impressions as, “our more lively perceptions, when we hear, or see, or feel, or love, or hate, or desire, or will.”⁹ Later, Hume explains that ideas are simply imitations of impressions. Hume also rejects the possibility of establishing cause and effect outside of experience. He explains, “No object ever discovers, by the qualities which appear to the senses, either the causes which produced it, or the effects which will arise from it; nor can our reason, unassisted by experience, ever draw any inference concerning real existence and matter of fact.”¹⁰ All humans have, according to Hume, is experience.

Hume continues this argument, applying it to ethics in, *A Treatise of Human Nature*.¹¹ He argues that virtue and vice can not be determined by rational thought. Ethics is nothing more than impressions and is subsequently a feeling, not a judgement. The feeling is that of pleasure and pain. Hume explains the origin of virtue and vice noting, “we must allow, that the sense of justice and injustice is not derived from nature, but arises artificially, though necessarily from education, and human conventions.”¹² Humans only behave in a certain way for the common interest of society since without justice humans would not be safe nor be able to work together. Hume explains justice as, “justice establishes itself by a kind of convention or agreement; that is, by a sense of interest, supposed to be common to all, and where every single act is performed in expectation that others are to perform the like.”¹³

⁹ Hume, *An Enquiry Concerning Human Understanding*, location 182 - 185.

¹⁰ Hume, *An Enquiry Concerning Human Understanding*, location 195, 289.

¹¹ David Hume, *A Treatise of Human Nature*, Kindle edition.

¹² Hume, *A Treatise of Human Nature*, location 6708, 6785, 6867.

¹³ Hume, *A Treatise of Human Nature*, location 6991, 7042, 7105; David Hume, *Of the Origin of Government*, in *Selected Essays*, ed. Stephen Copley and Andrew Edgar (Oxford, England: Oxford University Press, 2008), 28.

Hume's views are in sharp contrast to many other Enlightenment thinkers since Hume rejects the original state of nature.

The original state of nature does not exist, according to Hume. Hume argues that in almost all cases, governments have not been established based on the consent of the people, but rather out of conquest or revolt. He continues by arguing that even in societies in which the people did establish a government based on consent, it was not carried out in that fashion. For Hume, there are three variables that determine the strength of the government. These include "public interest, of right to power, and of right to property."¹⁴ Hume concludes that the commonwealth is the best form of government. In his ideal, only those with a certain amount of money are eligible to participate in the political process. Hume notes:

The lower sort of people and small proprietors are good enough judges of one not very distant from them in rank or habitation; and therefore, in their parochial meetings, will probably choose the best, or nearly the best representative: but they are wholly unfit for country meetings, and for electing into the higher offices of the republic. Their ignorance gives the grandees an opportunity of deceiving them.¹⁵

Political judgement, for Hume, rests with the upper class who have the opportunity to elect the upper offices of government and make significant decisions. Jean-Jacques Rousseau, in sharp contrast to many Enlightenment philosophers, attempts to question the notion of society at a fundamental level.

¹⁴ David Hume, *Of the Original Contract*, in *Selected Essays*, ed. Stephen Copley and Andrew Edgar (Oxford, England: Oxford University Press, 2008), 279, 281; David Hume, *Of the First Principles of Government*, in *Selected Essays*, ed. Stephen Copley and Andrew Edgar (Oxford, England: Oxford University Press, 2008), 25 - 26.

¹⁵ David Hume, *Idea of a Perfect Commonwealth*, in *Selected Essays*, ed. Stephen Copley and Andrew Edgar (Oxford, England: Oxford University Press, 2008), 303, 308 - 309.

Jean-Jacques Rousseau

Rousseau (1712 - 1788 CE) was a Genevan philosopher who influenced both the American and French Revolutions. In his popular work, *The Social Contract*, Rousseau notes, “Man is born free, and everywhere he is in chains. One believes himself the others’ master, and yet is more a slave than they.”¹⁶ Rousseau believes that the creation of society was not necessarily advantageous to men with respect to virtue. He explains that contemporary society is only concerned with money and considers humans to be mere objects. He notes that this is a consequence of luxury and results from an education system that dismisses virtue. At base, Rousseau argues that the notion of citizen has disappeared in the modern world.¹⁷ Rousseau looks back to the original state of nature for answers.

For Rousseau, men in the original state of nature were equal and were concerned only with self-preservation. Legitimacy could only be determined based on convention. Comparing contemporary “Savage man” to humans in society, Rousseau notes that the “Savage man” never complains about his life. In addition, inequality does not exist in the state of nature. Rousseau describes the transition out of the state of nature as:

man, who had previously been free and independent, is now so to speak subjugated by a multitude of new needs to the whole of Nature, and especially to those of his kind, who slave in a sense becomes even by

¹⁶ Jean-Jacques Rousseau, *The Social Contract*, in *The Social Contract and other later political writings*, ed. Victor Gourevitch (Cambridge, England: Cambridge University Press, 1997), 41.

¹⁷ Jean-Jacques Rousseau, *Discourse on the Sciences and Arts*, in *The Discourses and other early political writings*, ed. Victor Gourevitch (Cambridge, England: Cambridge University Press, 1997), 18, 20, 22, 24.

becoming their master; rich, he needs their services; poor, he needs their help, and moderate means do not enable him to do without them.¹⁸

Inequality, for Rousseau, arose out of the creation of law, the creation of property, and the establishment of masters and slaves. Inequality, which did not exist in the state of nature, becomes rampant in modern society.¹⁹

Eliminating inequality is the job of the government, according to Rousseau.

Rousseau notes:

It is, therefore, one of the most important tasks of government to prevent extreme inequality of fortunes, not by taking their treasures away from those who possess them, but by depriving everyone of the means to accumulate treasures, nor by building poorhouses, but by shielding citizens from becoming poor.²⁰

Legitimacy of government, for Rousseau, is determined by the primary interest of the government. If the government is concerned with the good of the people and follows the general will, then the government is legitimate. Rousseau describes this social compact as, “Each of us puts his person and his full power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole.”²¹ This necessarily implies that the citizens have some level of freedom and have been educated with a sense of virtue. He explains, “The fatherland cannot endure without freedom, nor

¹⁸ Jean-Jacques Rousseau, *Discourse on the Origin and Foundations of Inequality Among Men*, in *The Discourses and other early political writings*, ed. Victor Gourevitch (Cambridge, England: Cambridge University Press, 1997), 124, 139, 150, 159, 170; Rousseau, *The Social Contract*, 42, 44.

¹⁹ Rousseau, *Discourse on the Origin and Foundations of Inequality Among Men*, 182, 188.

²⁰ Jean-Jacques Rousseau, *Discourse on Political Economy*, in *The Social Contract and other later political writings*, ed. Victor Gourevitch (Cambridge, England: Cambridge University Press, 1997), 19.

²¹ Rousseau, *Discourse on Political Economy*, 9; Rousseau, *The Social Contract*, 50.

freedom without virtue, nor virtue without citizens; you will have everything if you form citizens; if you do not, you will have nothing but nasty slaves, beginning with the chiefs of the state.”²²

Man, under the social contract, gives up his natural freedom in order to have freedom through society. The general will is sovereign and the end of legislation ought to be freedom and equality. While Rousseau does not believe that one can determine what is the best form of government, he does give some clues. Using satire, Rousseau explains the characteristics that would embody his ideal form of government. The government would be a democracy and be focused on the freedom of the citizens. All citizens in the state would be equal under the law and all would have the opportunity to participate in legislation.²³ Political judgement, for Rousseau, rests with the general will. The next philosopher, Immanuel Kant, takes one back to the metaphysical ideal forms of Plato.

Immanuel Kant

Kant (1724 - 1804 CE) was a German philosopher best known for his attempt to reconcile the differences between rationalism and empiricism. With respect to political philosophy, Kant argued that justice is absent in the state of nature. As a result, it is natural for man to want to live in society. Society denotes progress and the goal for society is to be able to administer justice properly. Kant explains, “The highest task which nature has set for mankind must therefore be that of establishing a society in which *freedom under external*

²² Rousseau, *Discourse on Political Economy*, 9, 15, 20.

²³ Rousseau, *The Social Contract*, 54 - 55, 57, 78, 104 - 105; Rousseau, *Discourse on the Origin and Foundations of Inequality Among Men*, 115 - 116.

*laws*²⁴ would be combined to the greatest possible extent with irresistible force, in other words of establishing a perfectly *just civil constitution*.²⁵ It is only after the creation of this society that man can progress to his highest purpose, which for Kant is a “cosmopolitan existence.”²⁶

The Enlightenment, for Kant, denotes progress. This progress can only occur if man is free to utilize reason with respect to public issues. Kant describes this public use of reason as, “the use which anyone may make of it *as a man of learning* addressing the entire *reading public*.”²⁷ Kant believes that it is critical and necessary for individuals to possess political judgement and address the public directly. In order to do this, the citizenry must possess a large amount of civil freedom.

Kant believes that the government of an ideal state ought to be a commonwealth and it is based on three a priori principles. These principles include:

1. The *freedom* of every member of society as a *human being*.
2. The *equality* of each with all the others as a *subject*.
3. The *independence* of each member of a commonwealth as a *citizen*.²⁸

Kant explains the role of the ruler as:

²⁴ All italics in this section are from the source.

²⁵ Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in *Political Writings*, 2nd ed., ed. H.S. Reiss, trans. H.B. Nisbet (Cambridge, England: Cambridge University Press, 1991), 44 - 46; Immanuel Kant, *The Metaphysics of Morals*, in *Political Writings*, 2nd ed., ed. H.S. Reiss, trans. H.B. Nisbet (Cambridge, England: Cambridge University Press, 1991), 137.

²⁶ Kant, *Idea for a Universal History*, 50 - 51.

²⁷ Immanuel Kant, *An Answer to the Question: ‘What is Enlightenment?’*, in *Political Writings*, 2nd ed., ed. H.S. Reiss, trans. H.B. Nisbet (Cambridge, England: Cambridge University Press, 1991), 55.

²⁸ Immanuel Kant, *On the Common Saying: ‘This May be True in Theory but it Does Not Apply in Practice,’* in *Political Writings*, 2nd ed., ed. H.S. Reiss, trans. H.B. Nisbet (Cambridge, England: Cambridge University Press, 1991), 73 - 74.

So long as he sees to it that all true or imagined improvements are compatible with the civil order, he can otherwise leave his subjects to do whatever they find necessary for their salvation, which is none of his business. But it is his business to stop anyone forcibly hindering others from working as best they can to define and promote their salvation.²⁹

Citizens, according to Kant, include those that have the right to vote on legislation with the qualification being a free adult male who owns property. The end of this type of government is “perpetual peace.”³⁰ Kant contrasts his ideal commonwealth with a democracy. Kant believes that it is necessary to separate the legislative from the executive, since the people cannot act as both the executive and the legislative simultaneously. Kant believes that the legislative power ought to be in the hands of the people. The person who has executive power is the ruler of the state and is also subject to the legislation enacted by the people.³¹

Political judgement, as a result, rests with the people with respect to legislation. Kant defines judgement as:

A judgment, therefore, is the mediate cognition of an object, consequently the representation of a representation of it. In every judgment there is a conception which applies to, and is valid for, many other conceptions, and which among these comprehends also a given representation, this last being immediately connected with an object.³²

These political judgements ought to be made according to the “universal law of right.” Kant describes this as, “Thus the universal law of right is as follows: let your external actions be

²⁹ Kant, *An Answer to the Question*, 56, 58 - 59.

³⁰ Kant, *On the Common Saying*, 77 - 78; Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in *Political Writings*, 2nd ed., ed. H.S. Reiss, trans. H.B. Nisbet (Cambridge, England: Cambridge University Press, 1991), 100.

³¹ Kant, *Perpetual Peace*, 100 - 102; Kant, *The Metaphysics of Morals*, 139, 141 - 142.

³² Immanuel Kant, *Critique of Pure Reason*, trans. J.M.D. Meiklejohn (New York, NY: Barnes & Noble, 2004), 31.

such that the free application of your will can co-exist with the freedom of everyone in accordance with a universal law.”³³ In the *Critique of Practical Reason*, Kant describes how to act just specifically. He explains, “Act so that the maxim of thy will can always at the same time hold good as a principle of universal legislation.”³⁴

An important concept for Kant is the idea. He explains an idea as, “no object can ever be presented that would be perfectly adequate to a transcendental idea. . . . because the idea, as the conception of a maximum, can never be completely and adequately presented *in concreto*.”³⁵ In addition to the idea, Kant discusses the ideal. Similar to Plato's ideal forms, a Kantian ideal would be the perfection of an idea. Kant explains:

As the idea provides a rule, so the ideal serves as an *archetype* for the perfect and complete determination of the copy. Thus the conduct of the wise and divine man serves us a standard of action, with which we may compare and judge ourselves, which may help us to reform ourselves, although the perfection it demands can never be attained by us. Although we cannot concede objective reality to these ideals, they are not to be considered as chimeras; on the contrary, they provide reason with a standard, which enables it to estimate, by comparison, the degree of incompleteness in the objects presented to it.³⁶

For Kant, ideas can be used in a “regulative” sense in the hopes of “approximating” the ideal.³⁷ As a result, political judgement for Kant rests with the individual using regulative

³³ Kant, *The Metaphysics of Morals*, 133.

³⁴ Immanuel Kant, *Critique of Practical Reason*, trans. Thomas Kingsmill Abbott, prepared by Matthew Stapleton, Kindle edition, location 406.

³⁵ Kant, *Critique of Pure Reason*, 176 - 177.

³⁶ Kant, *Critique of Pure Reason*, 281 - 282.

³⁷ Kant, *Critique of Pure Reason*, 319, 321.

judgement based on the idea of freedom discussed above. This survey continues with Georg Wilhelm Friedrich Hegel, a German philosopher influenced by Kant.

Georg W. F. Hegel

Hegel (1770 - 1831 CE)³⁸ was a prominent German idealist whose most well known work of political philosophy was the *Philosophy of Right*.³⁹ Unlike most previous political philosophers, Hegel is less concerned with advocating a particular ideal version of the state, but rather to show that the state is a “rational entity.”⁴⁰ He explains:

To comprehend *what is*⁴¹ is the task of philosophy, for *what is* is reason. As far as the individual is concerned, each individual is in any case a *child of his time*; thus philosophy, too, is *its own time comprehended in thoughts*. It is just as foolish to imagine that any philosophy can transcend its contemporary world as that an individual can overleap his own time or leap over Rhodes. If his theory does indeed transcend his own time, if it builds itself a world *as it ought to be*, then it certainly has an existence, but only within his opinions – a pliant medium in which the imagination can construct anything it pleases. . . . What lies between reason as self-conscious spirit and reason as present actuality, what separates the former from the latter and prevents it from finding satisfaction in it, is the fetter of some abstraction or other which has not been liberated into [the form of] the concept. To recognize reason as the rose in the cross of the present and thereby to delight in the present – this rational insight is the *reconciliation* with actuality which philosophy grants to those who have received the inner call *to comprehend*, to preserve their subjective freedom in the realm of the substantial, and at the same time to

³⁸ Within the academic community there exists a debate over Hegel’s political philosophy. Some scholars privilege his metaphysical writings while others look towards his more practical pieces. This enquiry is concerned more specifically with political judgement and as a result will not engage in this controversy. For more information see the general introduction in, G. W. F. Hegel, *Political Writings*, ed. Laurence Dickey and H.B. Nisbet, trans. H.B. Nisbet (Cambridge, England: Cambridge University Press, 1999), Kindle edition.

³⁹ G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet (Cambridge, England: Cambridge University Press, 1991).

⁴⁰ Hegel, *Philosophy of Right*, 21.

⁴¹ All italics in this section are from the source.

stand with their subjective freedom not in a particular and contingent situation, but in what has being in and for itself.⁴²

The only requirement concerning the creation of a state, for Hegel, is that “it should form a common military force and political authority.”⁴³

The importance of the state, with respect to the individual, in Hegel’s thought is evident by his quote of a Pythagorean man addressing his son explaining, “Make him the *citizen of a state with good laws*.”⁴⁴ As such, Hegel believes that government and man must be consistent. He comments, “How blind are those who like to believe that institutions, constitutions, and laws which no longer accord with men’s customs, needs, and opinions, and from which the spirit has departed, can continue to exist, or that forms in which feeling and understanding no longer have an interest are enough to furnish a lasting bond for a nation.”⁴⁵

For Hegel, history involves the progression of the Idea of freedom. He argues that the role of the state is to uphold this natural right of freedom and that the role of the government is to administer the laws and look after the state. There exists an interconnectedness between the individual and society. Hegel explains:

The selfish end in its actualization, conditioned in this way by universality, establishes a system of all-round interdependence, so that the subsistence [*Subsistenz*] and welfare of the individual [*des Einzelnen*] and his rightful existence [*Dasein*] are interwoven with, and grounded on, the subsistence,

⁴² Hegel, *Philosophy of Right*, 21 - 22.

⁴³ G. W. F. Hegel, *The German Constitution*, in *Political Writings*, ed. Laurence Dickey and H.B. Nisbet, trans. H.B. Nisbet (Cambridge, England: Cambridge University Press, 1999), Kindle edition, 16.

⁴⁴ Hegel, *Philosophy of Right*, 196.

⁴⁵ G. W. F. Hegel, *The Magistrates should be Elected by the People*, in *Political Writings*, ed. Laurence Dickey and H.B. Nisbet, trans. H.B. Nisbet (Cambridge, England: Cambridge University Press, 1999), Kindle edition, 2.

welfare, and rights of all, and have actuality and security only in this context.⁴⁶

The individual is only able to conduct an ethical life by being part of the state. This is not to say that Hegel necessarily supports a democracy. Hegel notes:

The idea [*Vorstellung*] that *all* individuals ought to participate in deliberations and decisions on the universal concerns of the state – on the grounds that they are all members of the state and that the concerns of the state are the concerns of *everyone*, so that everyone has a *right* to share in them with his own knowledge and volition – seeks to implant in the organism of the state a *democratic* element *devoid of rational form*, although it is only by virtue of its rational form that the state is an organism.⁴⁷

Hegel continues by arguing that it is through public opinion that individuals in society can exercise and express opinions. Political judgement cannot rest directly with the citizens according to Hegel. He argues that this is due to the large populations of modern states making it infeasible to have all citizens make the decisions.⁴⁸ The next political philosopher is John Stuart Mill.

John Stuart Mill

The utilitarian principles of Mill (1806 - 1873 CE)⁴⁹ were first echoed by Jeremy Bentham (1748 - 1832 CE). As a result, this section first looks to the ideas of Bentham and then moves on to Mill. Bentham, the founder of utilitarianism, established the principle of utility to determine appropriate moral action. Bentham explains:

⁴⁶ Hegel, *Philosophy of Right*, 221; G. W. F. Hegel, *Lectures on the Philosophy of History*, in *Political Writings*, ed. Laurence Dickey and H.B. Nisbet, trans. H.B. Nisbet (Cambridge, England: Cambridge University Press, 1999), Kindle edition, 212, 215, 223.

⁴⁷ Hegel, *Philosophy of Right*, 276, 347.

⁴⁸ Hegel, *Philosophy of Right*, 353; Hegel, *The German Constitution*, 21.

⁴⁹ John Stuart Mill's views on freedom of thought were discussed in Chapter 2.

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government.⁵⁰

The role of the individual is to promote pleasure and minimize pain. The role of the government, more specifically, is to maximize the happiness of society and minimize bad behavior. Bentham argues that there are four sources or sanctions of pleasure and pain. These sanctions include the physical, political, moral, and religious. Bentham also establishes seven criteria to consider when making decisions using the utility principle to measure pleasure and pain. The criteria include intensity, duration, certainty or uncertainty, nearness or remoteness, magnitude, purity, and extent.⁵¹ Mill would expound upon the utilitarian principles established by Bentham.

Mill believes in the notion of Philosophical Necessity. Philosophical Necessity holds that the action of an individual, like that of a physical event, could be determined if one understood the complete nature of the individual. Mill does not take this to mean that individual actions are predetermined, only that this means unless the person alters himself in some fashion or is influenced in a certain manner, the action will occur. This ability to alter oneself, Mill calls moral freedom.⁵²

⁵⁰ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *Utilitarianism and Other Essays*, ed. Alan Ryan (London, England: Penguin Books, 2004), 65 - 66.

⁵¹ Bentham, *Principles of Morals and Legislation*, 83 - 84, 86 - 89, 97.

⁵² John Stuart Mill, *A System of Logic*, in *Utilitarianism and Other Essays*, ed. Alan Ryan (London, England: Penguin Books, 2004), 114, 116 - 119.

Moral freedom, or ethics for Mill, is an art not a science. The act of legislation is in the same realm. The legislator is not constrained completely to rules like a judge, but rather is able to incorporate other modes of thought. Mill explains:

By a wise practitioner, therefore, rules of conduct will only be considered as provisional. Being made for the most numerous cases, or for those of most ordinary occurrence, they point out the manner in which it will be least perilous to act, where time or means do not exist for analysing the actual circumstances of the case, or where we cannot trust our judgement in estimating them.⁵³

Legislation deals with ought not is. Mill, following Bentham, looks to happiness as the ethical criteria.⁵⁴

The focus of Mill's *Utilitarianism*⁵⁵ is to establish a criteria to answer ethical questions. Mill explains his criteria as:

The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.⁵⁶

Mill argues that it is not the individual happiness that is the criteria, but the happiness of everyone that is in question. Utility is the standard of morality for Mill. To establish this in a practical sense, Mill believes that the education system would need to be reformed to ingrain in the character of children that a link exists between individual happiness and the

⁵³ Mill, *A System of Logic*, 121 - 122, 124.

⁵⁴ Mill, *A System of Logic*, 127, 129 -130.

⁵⁵ John Stuart Mill, *Utilitarianism*, in *Utilitarianism and Other Essays*, ed. Alan Ryan (London, England: Penguin Books, 2004).

⁵⁶ Mill, *Utilitarianism*, 272, 278.

happiness of the whole. As a result, political judgement rests with the individual making an impartial decision with respect to the Utility principle.⁵⁷ The next philosopher, Karl Marx, was influenced in many respects by Hegel.

Karl Marx

Marx (1818 - 1883 CE) was a German philosopher who argued that class struggle represents the history of society. Specifically, in a capitalistic society, the class struggle occurs between the *Bourgeoisie* and the *Proletariat*. The Bourgeoisie represents the dominant social class and control the economic means of production. Governmental decisions are made based on their influence, according to Marx. The Proletariat represents the working class who lack both control over the means of production and political power. Marx believes that the Proletariat are being exploited by the Bourgeoisie, turned into a commodity, and that everything in society is based on exchange.⁵⁸

Marx denotes the purpose of the Communist Party as to unite the Proletarian, overthrow the Bourgeoisie, and take political power. Marx explains, “In bourgeois society, living labour is but a means to increase accumulated labour. In Communist society, accumulated labour is but a means to widen, to enrich, to promote the existence of the labourer.”⁵⁹ The end goal of communism is the elimination of private property. In *The German Ideology*, Marx describes communism as:

⁵⁷ Mill, *Utilitariansim*, 282 - 283, 288 - 289, 299, 301.

⁵⁸ Karl Marx and Friedrich Engels, *The Communist Manifesto*, (Oxford, England: Oxford University Press, 2008), 3, 5, 9 - 10, 15.

⁵⁹ Marx and Engels, *The Communist Manifesto*, 17 - 19.

Communism differs from all previous movements in that it overturns the basis of all earlier relations of production and intercourse, and for the first time consciously treats all naturally evolved premises as the creations of hitherto existing men, strips them of their natural character and subjugates them to the power of the united individuals. Its organisation is, therefore, essentially economic, the material production of the conditions of this unity. The reality which communism creates is precisely the true basis for rendering it impossible that anything should exist independently of individuals, insofar as reality is nevertheless only a product of the preceding intercourse of individuals. Thus the communists in practice treat the conditions created up to now by production and intercourse as inorganic conditions, without, however, imagining that it was the plan or the destiny of previous generations to give them material, and without believing that these conditions were inorganic for the individual creating them.⁶⁰

Political judgement, for Marx, is best summarized by the communist slogan, “From each according to his abilities, to each according to his needs!”⁶¹ Friedrich Nietzsche, the next philosopher, would begin to shake the foundations of Western philosophy.

Friedrich Nietzsche

Nietzsche (1844 - 1900 CE) was a German philosopher who eloquently expressed his criticism of modern culture. Humans in the original state of nature, for Nietzsche, could be compared to barbarians. The strong overtook the weak. Rejecting the notion that humans created society for mutual benefit, Nietzsche notes that it is the “exploitive” nature of man that is at the heart of humanity. Nietzsche explains, “life is *essentially*⁶² appropriation,

⁶⁰ Karl Marx and Friedrich Engels, *The German Ideology*, (New York, NY: Prometheus Books, 1998), 89 - 90.

⁶¹ Karl Marx, *The Criticism of the Gotha Program*, in *Capital and Other Writings of Karl Marx*, ed. Max Eastman, (New York, NY: Carlton House, 1932), 7.

⁶² All italics in this section are from the source.

injury, overpowering, of what is alien and weaker; suppression, hardness, imposition of one's own forms, incorporation and at least, at its mildest, exploitation.”⁶³

Nietzsche questions the rational foundation most philosophers have applied to morality. Instead, he denotes two types of morality that overlap in the individual. These include “master morality” and “slave morality.” Master morality signifies the class with power determining what is moral. Nietzsche explains, “The noble type of man experiences *itself* as determining values; it does not need approval; it judges . . . it knows itself to be that which first accords honor to things; it is *value-creating*. Everything it knows as part of itself it honors: such a morality is self-glorification.”⁶⁴ Slave morality, on the other hand, is signified by, “a pessimistic suspicion about the whole condition of man . . . he is skeptical and suspicious . . . slave morality is essentially a morality of utility.”⁶⁵

Nietzsche also differentiates between what he calls the historical and unhistorical. He argues the importance of both for the individual and society as a whole. Modern man, for Nietzsche, puts too much emphasis on the historical. Nietzsche explains:

For we moderns have nothing of our own. We only become worth notice by filling ourselves to overflowing with foreign customs, arts, philosophies, religions and sciences; we are wandering encyclopaedias, as an ancient Greek who had strayed into our time would probably call us. But the only value of an encyclopaedia lies in the inside, in the contents, not in what is written

⁶³ Friedrich Nietzsche, *Beyond Good and Evil*, in *Basic Writings of Nietzsche*, trans. Walter Kaufmann, ed. Walter Kaufmann, (New York, NY: The Modern Library, 2000), 287, 391 - 393.

⁶⁴ Nietzsche, *Beyond Good and Evil*, 394 - 395.

⁶⁵ Nietzsche, *Beyond Good and Evil*, 397.

outside, in the binding or the wrapper. And so the whole of modern culture is essentially internal.⁶⁶

Nietzsche believes that the modern man ignores what is actually in front of him in order to compare, analyze, and summarize. This has significant implications with respect to judgement.⁶⁷

Nietzsche notes that judgement is not something that can be willed. He explains that only a few have the ability to be just. Nietzsche explains that the origin of justice is based on self-preservation and amounted to a trade between individuals. It was completely egoistic. He also notes that justice has nothing to do with objectivity. Nietzsche says, “But there are no means of planting a power of judgment; and so when one speaks to men of truth and justice, they will be ever troubled by the doubt whether it be the fanatic or the judge who is speaking to them.”⁶⁸ Nietzsche believes that it is not proper for the current generation to judge the past, reserving this power for a select few. Connecting judgement to the modern emphasis on the historical, Nietzsche explains:

If there be no constructive impulse behind the historical one, if the clearance of rubbish be not merely to leave the ground free for the hopeful living future to build its house, if justice alone be supreme, the creative instinct is sapped and discouraged. A religion, for example, that has to be turned into a matter of historical knowledge by the power of pure justice, and to be scientifically studied throughout, is destroyed at the end of it all. For the historical audit brings so much to light which is false and absurd, violent and inhuman, that the condition of pious illusion falls to pieces.⁶⁹

⁶⁶ Friedrich Nietzsche, *The Use and Abuse of History*, trans. Adrian Collins, (New York, NY: The Liberal Arts Press, 1949), 16, 18 - 19, 32.

⁶⁷ Nietzsche, *The Use and Abuse of History*, 40 - 41.

⁶⁸ Nietzsche, *The Use and Abuse of History*, 42 - 43, 45, 148 - 149.

⁶⁹ Nietzsche, *The Use and Abuse of History*, 47, 49.

There are no hard and fast rules with respect to political judgement for Nietzsche. In this respect, Lyotard is consistent with Nietzsche. Martin Heidegger, the controversial German philosopher who challenged the prevailing notion of truth, will be discussed next.

Martin Heidegger

Heidegger (1889 - 1976 CE) was a German philosopher who had a significant influence on the development of phenomenology, existentialism, and post-structuralism. He is predominantly interested in the neglected notion of *Being*, and in general did not deal with political judgement directly. Heidegger believes that Western philosophy, after the Greeks, has abandoned the question of what constitutes being. Heidegger rejects previous attempts to understand the nature of Being through some type of metaphysical concept such as Plato's ideal forms or the notion of a God. Instead, he proposes to attempt to understand Being through a specific example he refers to as *Dasein* which can be roughly translated as existence.⁷⁰

Analyzing *Dasein* allows Heidegger to analyze Being. He explains that this analysis, "only brings out the Being of this being, without interpreting its meaning. Its aim is rather to expose the horizon for the most original interpretation of Being. Once we have reached that horizon the preparatory analysis of *Dasein* requires recovery on a higher, properly ontological basis."⁷¹ Central to this analysis is the notion of time. Rejecting all previous analysis from the Greeks to the present, Heidegger describes his task as:

⁷⁰ Martin Heidegger, *Being and Time: Introduction*, in *Basic Writings*, ed. David Farrell Krell, (London, England: HarperCollins, 2008), 41 - 49, 54.

⁷¹ Heidegger, *Being and Time*, 60.

If the question of Being is to achieve clarity regarding its own history, a loosening of the sclerotic tradition and a dissolving of the concealments produced by it are necessary. We understand this task as the *destructuring*⁷² of the traditional content of ancient ontology, which is to be carried out along the *guidelines of the question of Being*. This destructuring is based on the original experiences in which the first and subsequently guiding determinations of Being were gained.⁷³

Heidegger, following Husserl, refers to his type of analysis as phenomenology.⁷⁴

Heidegger uses the notion of anxiety as an attempt to understand Dasein. Heidegger explains, “Holding itself out into the nothing, Dasein is in each case already beyond beings as a whole. This being beyond beings we call ‘transcendence.’ If in the ground of its essence Dasein were not transcending, which now means, if it were not in advance holding itself out into the nothing, then it could never be related to being nor even to itself.”⁷⁵ As a result, Dasein is a question of metaphysics.⁷⁶

Truth, for Heidegger, is based on the notion of freedom. Heidegger explains:

Freedom, understood as letting beings be, is the fulfillment and consummation of the essence of truth in the sense of the disclosure of beings. ‘Truth’ is not a feature of correct propositions that are asserted of an ‘object’ by a human ‘subject’ and then ‘are valid’ somewhere, in what sphere we know not; rather, truth is disclosure of beings through which an openness

⁷² All italics in this section are from the source. Jacques Derrida’s notions of deconstruction is heavily influenced by Heidegger’s notion of destructuring.

⁷³ Heidegger, *Being and Time*, 60 - 61, 66 - 71.

⁷⁴ Heidegger, *Being and Time*, 72, 85.

⁷⁵ Martin Heidegger, *What Is Metaphysics?*, in *Basic Writings*, ed. David Farrell Krell, (London, England: HarperCollins, 2008), 103.

⁷⁶ Heidegger, *What is Metaphysics?*, 107 - 109.

essentially unfolds [*welt*]. All human comportment and bearing are exposed in its open region.⁷⁷

Philosophy, for Heidegger, should not be compared to the sciences and it is not based on logic. He also dismisses humanism believing that to dismiss logic allows one to engage in reflective thinking. Heidegger, responding to critics explains, “To think against values therefore does not mean to beat the drum for the valuelessness and nullity of beings. It means rather to bring the clearing of the truth of Being before thinking, as against subjectivizing beings into mere objects.”⁷⁸ While Heidegger does not directly discuss political judgement, his challenge to the prevailing notion of truth is important on the trajectory of political philosophy. John Rawls, the next philosopher, offers a much more contemporary version of political judgement.

John Rawls

Rawls (1921 - 2002 CE) was an American political philosopher most known for his *A Theory of Justice*.⁷⁹ Composed as an alternative to utilitarianism and intuitionism, Rawls crafts a political philosophy following Kant.⁸⁰ Rawls believes that justice is the cornerstone

⁷⁷ Martin Heidegger, *On the Essence of Truth*, in *Basic Writings*, ed. David Farrell Krell, (London, England: HarperCollins, 2008), 123 - 124, 127.

⁷⁸ Martin Heidegger, *Letter on Humanism*, in *Basic Writings*, ed. David Farrell Krell, (London, England: HarperCollins, 2008), 218 - 219, 248 - 251.

⁷⁹ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: The Belknap Press of Harvard University Press, 1999).

⁸⁰ A contemporary libertarian political philosophy opposed to Rawls was proposed by the American political philosopher Robert Nozick (1938 - 2002 CE). He summarizes his view as, “Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons’ rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right. Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their *own* [*italics in original source*] good or protection.” Robert Nozick, *Anarchy, State, and Utopia*, (New York, NY: Basic Books, 1974), Kindle

of institutions and as a result, he supports traditional notions of individual democratic liberty. In particular, Rawls is concerned with social justice and how rights are distributed in society through institutions. He accepts social contract theory as an appropriate hypothetical scenario to establish justice. At base, Rawls privileges “rational choice” theory believing that it is in an individuals best interest to accept notions of justice. Rawls illustrates is conception of justice for institutions as follows:

FIRST PRINCIPLE

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

SECOND PRINCIPLE

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

FIRST PRIORITY RULE (THE PRIORITY OF LIBERTY)

The principles of justice are to be ranked in lexical order and therefore the basic liberties can be restricted only for the sake of liberty. There are two cases:

- (a) a less extensive liberty must strengthen the total system of liberties shared by all;
- (b) a less than equal liberty must be acceptable to those with the lesser liberty.

SECOND PRIORITY RULE (THE PRIORITY OF JUSTICE OVER EFFICIENCY AND WELFARE)

The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle. There are two cases:

- (a) an inequality of opportunity must enhance the opportunities of those with the lesser opportunity;
- (b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship.⁸¹

It is through the political process that citizens have the obligation to ensure that justice is the foundation of the institutions.

For Rawls, justice is consistent with the prevailing notions of basic liberties that are established in most constitutional democracies. These basic liberties include freedom of thought, freedom of speech, the right to own property, and the right to vote, among others. It is important to note that Rawls rejects the notion that justice consists of a priori principles. Whether something is considered just or unjust is not a preconceived notion, rather political judgement rests with the individual. The expression of this political judgement is done in the voting booth.⁸²

Summary

This chapter, the second of a two-chapter survey of the history of political judgement, began with Montesquieu and culminated with Rawls. Chapter 3 began with Protagoras and ended with Locke. Montesquieu believes that political judgement ought to rest with elected representatives. Hume, on the other hand, supports the elite possessing political judgement. Rousseau introduces the concept of general will with respect to political judgement. Kant argues that political judgement rests with individuals using regulative judgement based on his idea of freedom. Hegel does not recognize political judgement in the hands of ordinary

⁸¹ Rawls, *A Theory of Justice*, xvii - xviii, 3 - 4, 6, 10 - 11, 15, 266 - 267.

⁸² Rawls, *A Theory of Justice*, 53, 506.

citizens. Mill believes that it rests with individual citizens utilizing the Utility principle. Marx, revolutionarily, supports the abolition of private property and a communist society. Nietzsche is critical of everything and Heidegger challenges the prevailing notion of truth. Lastly, Rawls advocates a liberal notion of political judgement resting with the individual in the voting booth.

Chapter 5

Standardized Testing and Freedom of Thought:

A Lyotardian Examination

Reality is not a matter of the absolute eyewitness, but a matter of the future.¹

-Jean-François Lyotard

Introduction

The purpose of this Critical Enquiry is to examine whether the practice of government mandated standardized achievement tests of knowledge in American public schools is consistent with the type of education necessary for citizens to exercise their right to freedom of thought in order to make informed political judgements. Beginning with a description of standardized testing and a review of the notion of freedom of thought, this chapter is an examination of the implications of standardized testing on freedom of thought through a Lyotardian lens. Since the analysis depends on an adequate understanding of Lyotard, Lyotard's philosophy will be integrated throughout the analysis.

¹ Lyotard, *The Differend*, 53.

Standardized Testing

As discussed in Chapter 1, the practice of standardized testing has been embedded in federal legislation since 1965 after passage of the Elementary and Secondary Education Act. Current education policy, Race to the Top, mandates the use of standardized testing in order for states to compete for federal funds. Richard P. Phelps, a supporter of standardized testing, considers a test to be standardized, “if any aspect of a test—format, procedures, or administration—is uniform across test takers.”² Phelps failed to recognize the fundamental aspect of standardized testing, for a test to be “standardized” the knowledge tested must be assumed to be “true”—universally accepted as being outside the bounds of knowledge. The two basic types of standardized tests are achievement tests, the focus of this study, and aptitude tests. Unlike an aptitude test which is used in order to predict future success of some type, achievement tests are constructed to determine what has been previously learned. It must be noted that a strong correlation exists between standardized aptitude tests and standardized achievement tests. Standardized achievement tests, unlike teacher created classroom assessments, are designed to be a broad measure of student learning based on some type of ideal standard established outside of the classroom. Scoring can be interpreted from three different perspectives that include criterion-referenced, norm-referenced, or standards-based.³ It is necessary to consider the roots of standardized testing.

² Richard P. Phelps, *Standardized Testing Primer* (New York, NY: Peter Lange Publishing, 2007), 2.

³ Phelps, *Standardized Testing Primer*, 11; Thomas M. Haladyna, *Essentials of Standardized Achievement Testing: Validity and Accountability* (Boston, MA: Allyn & Bacon, 2002), 22 - 24, 62; Peter Sacks, *Standardized Minds: The High Price of America's Testing Culture and What We Can Do to Change It* (Cambridge, MA: Perseus Publishing, 1999), 49.

While the notion of standardization is ancient, the roots of standardization in the United States in the field of education can be traced to the United States Military Academy at Westpoint in the early 1800s. Sylvanus Thayer, Superintendent of West Point (1817 - 1833 CE), introduced a standardized grading system to assess student examinations. Thayer designed these to “objectively” measure and compare individual students.⁴ Standardization was popularized in the field of public education during what Raymond E. Callahan described as the scientific management movement which gained popularity in the early part of the twentieth century. Callahan noted that Frederick Winslow Taylor, the founder of scientific management, believed that it was possible to establish scientifically objective standards which would lead to improvements in efficiency.⁵

Scientific management was popularized in the field of education by Franklin Bobbitt, an education administration instructor at the University of Chicago, in the early 1900s. Bobbitt believed that one could view the education of children like the creation of a product in a factory. As a result, he advocated the use of both standardization and scales of measurement in public schools. Callahan, discussing Bobbitt, explained:

With this system neither students, teachers, nor principals could offer lame excuses for inferior performance, for with everything so definitely recorded there would be no place to hide and responsibility could be fixed. Furthermore, this would be done (as Taylor claimed it would be done in the machine shop) without anyone feeling that he had been treated unfairly because all of this would not be done arbitrarily but scientifically.⁶

⁴ Keith W. Hoskin and Richard H. Maeve, “The Genesis of Accountability: The West Point Connections,” *Accounting, Organizations and Society* 13, no. 1 (1988): 45 - 46.

⁵ Raymond E. Callahan, *Education and the Cult of Efficiency: A Study of the Social Forces That Have Shaped the Administration of the Public Schools* (Chicago, IL: The University of Chicago Press, 1962), 30.

⁶ Callahan, *Education and the Cult of Efficiency*, 79 - 83.

Also in the early 1900s, the Carnegie unit, based on the notions of standardization and efficiency, was having a significant effect on the structure of schooling. The Carnegie unit, established by the Carnegie Foundation, but originally developed by the Committee of Ten and the Committee on College Entrance Requirements, represented the standardization of time and credit for courses. Setting the standard for admission into college, the Carnegie unit was eventually utilized by public schools throughout the country since it was required by accreditation bodies and enacted into legislation in many states. As a result, the traditional school day developed with a day divided into periods of equal length and time.⁷ The rise of scientific management coupled with the universal adoption of the Carnegie unit provided a stable foundation for the utilization of standardized testing in American public schools. Before looking at the implications of standardized testing on freedom of thought, it is necessary to review the notion of freedom of thought.

Freedom of Thought

As discussed in Chapter 1, successful governance in a democracy requires citizens who possess the ability and resources to make informed political judgements which requires freedom of thought. It was recognized in this enquiry, as discussed in Chapter 2, that freedom of thought is fundamental to freedom of speech. Both are protected by the First Amendment. While the road towards recognition of freedom of thought has been tortuous, the United States Supreme Court has settled on the Brandenburg test in order to determine whether speech/thought is constitutional. In order for the government to suppress

⁷ David Tyack and Larry Cuban, *Tinkering Toward Utopia: A Century of Public School Reform* (Cambridge, MA: Harvard University Press, 1995), 91 - 93.

speech/thought, under *Brandenburg*, it is not enough that the speech incites criminal activity, the speech must also be likely to produce the said action. The Brandenburg test will be applied to standardized testing and freedom of thought following the Lyotardian examination.

Lyotardian Examination

This section is a deconstruction of the practice of standardized achievement testing through the work of Lyotard. Each facet of Lyotard's thought begins with philosophical foundations followed by practical implications.⁸ Of particular importance for this deconstruction is Lyotard's *The Postmodern Condition* and *The Differend*. *The Postmodern Condition*, Lyotard's most famous text, is a report concerned with the current state of knowledge in "highly developed societies."⁹ This report was prepared for the Conseil des Universités of the government of Quebec. In the report, Lyotard describes highly developed societies as postmodern which he defines as "incredulity toward metanarratives."¹⁰ In contrast, modern is used by Lyotard, "to designate any science that legitimates itself with reference to a metadiscourse of this kind making an explicit appeal to some grand narrative, such as the dialectics of Spirit, the hermeneutics of meaning, the emancipation of the rational or working subject, or the creation of wealth."¹¹ *The Differend* is organized as a series of short philosophical arguments interrupted, at times, by highly technical notices pertaining

⁸ The use of practical in practical implications is not to be confused with an Aristotelean sense of practical concerned with political knowledge.

⁹ Lyotard, *The Postmodern Condition*, xxiii.

¹⁰ Lyotard, *The Postmodern Condition*, xxiv.

¹¹ Lyotard, *The Postmodern Condition*, xxiii.

to a variety of philosophers. Both are instructive to examine standardized testing and freedom of thought.

Knowledge

Since Protagoras, philosophers have discussed the epistemological foundations of knowledge. Lyotard begins *The Postmodern Condition* by describing the state of knowledge in the postmodern age.

Philosophical Foundations

Lyotard argues that the state of knowledge in a particular society changes when it enters the postindustrial age and cultures enter the postmodern age. One feature of the postmodern age is the radical change that has taken place within the discourse of science with respect to technology. Lyotard argues that the changes in technology are bound to have an effect on research and teaching, the two major functions of knowledge. He believes that future research will be determined based on what can be translated into computers and that teaching is being altered based on the new mediums through which knowledge is made available. Lyotard further explains, “Knowledge is and will be produced in order to be sold, it is and will be consumed in order to be valorized in a new production: in both cases, the goal is exchange. Knowledge ceases to be an end in itself, it loses its ‘use-value.’”¹² For Lyotard, this has a significant effect on learning. No longer will one learn for educational reasons or to be enlightened, one will learn in order to make money (payment knowledge) or to increase the opportunity for future payment (investment knowledge).¹³

¹² Lyotard, *The Postmodern Condition*, 1-3.

¹³ Lyotard, *The Postmodern Condition*, 6.

In the society described above, after the transformation of knowledge, scientific discourse becomes dominant. The problem, Lyotard argues, is that there is a difference between knowledge and science. He argues that knowledge is a broad category that encompasses much more than the denotative statements that make up scientific knowledge. For Lyotard, scientific knowledge is simply a subset of a much larger category of knowledge composed of a variety of discourse. Lyotard describes knowledge:

But what is meant by the term *knowledge* is not only a set of denotative statements, far from it. It also includes notions of “know-how,” “knowing how to live,” “how to listen” [*savoir-faire, savoir-vivre, savoir-écouter*], etc. Knowledge, then, is a question of competence that goes beyond the simple determination and application of the criterion of truth, extending to the determination and application of criteria of efficiency (technical qualification), of justice and/or happiness (ethical wisdom), of the beauty of a sound or color (auditory and visual sensibility), etc. Understood in this way, knowledge is what makes someone capable of forming “good” denotative utterances. . . . It is not a competence relative to a particular class of statements (for example, cognitive ones) to the exclusion of all others. On the contrary, it makes “good” performances in relation to a variety of objects of discourse possible: objects to be known, decided on, evaluated, transformed. . . . From this derives one of the principal features of knowledge: it coincides with an extensive array of competence-building measures and is the only form embodied in a subject constituted by the various areas of competence composing it.¹⁴

In sum, for Lyotard, knowledge is an expansive category that includes not just scientific knowledge, but also a wide-variety of other discourses.

Practical Implications

Standardized testing has implications on freedom of thought when analyzed through Lyotard’s notion of the changing state of *knowledge*. Standardized testing, consistent with scientific knowledge, is limited to statements that can be declared either true or false. As a

¹⁴ Lyotard, *The Postmodern Condition*, 18-19.

result, students are required to select the one “true” answer and are unable to alter the selections. If schools focus on preparing students for the standardized test, then the curriculum becomes altered. Knowledge is dramatically effected since the curriculum is no longer concerned with student enlightenment nor pedagogy, but rather focused on payment and investment knowledge. What counts as knowledge on the standardized test becomes the focus of teaching along with preparation for the workplace. Learning, as a result, revolves around the denotative statements that make up scientific knowledge. In order for students to exercise their right to freedom of thought, students need to learn much more than just the cognitive knowledge emphasized on the standardized test. Freedom of thought requires as broad a spectrum of various types of knowledge as possible including, but not limited to, all aspects of knowledge described above by Lyotard.

Language Games

Lyotard analyzes knowledge, in the postmodern society, through his notion of language games. The notion of language games was originally conceptualized through the work of Ludwig Wittgenstein.¹⁵

Philosophical Foundations

Language games, for Lyotard, are made up of three elements—the sender, addressee, and referent. The sender is the person who utters a statement, the addressee is the person

¹⁵ Ludwig Wittgenstein (1889 - 1951 CE) was an influential twentieth century British philosopher who first developed the notion of language games. Wittgenstein believed that language was made up of smaller structures he called language games. *The Cambridge Dictionary of Philosophy*, 2nd ed., s.v. “Ludwig Wittgenstein.”

who receives a statement, and the referent is what the statement is about. Lyotard makes several observations about language games. He notes:

The first is that their rules do not carry within themselves their own legitimation, but are the object of a contract, explicit or not, between players (which is not to say that the players invent the rules). The second is that if there are no rules, there is no game, that even an infinitesimal modification of one rule alters the nature of the game, that a “move” or utterance that does not satisfy the rules does not belong to the game they define. The third remark is suggested by what has just been said: every utterance should be thought of as a “move” in a game.¹⁶

After this analysis, Lyotard discusses three different language games in the text—the *denotative*, *technical*, and *prescriptive*. Each game is incompatible with the others and has its own criteria of distinction.

In the denotative game, the criteria of distinction is true/false. The sender has the “knowledge” about the referent and it is up to the addressee to agree or disagree. Science is an example of a denotative language game. In the technical game, the criteria of distinction is efficient/inefficient. In this game, the sender has authority to make the statement and, unlike the denotative game, the addressee does not have a say in the matter. This language game might involve manufacturing. In the prescriptive game, the criteria of distinction is just/unjust. The sender occupies a position of authority and expects the addressee to comply with the prescription. This language game might include commands or orders. For Lyotard, language games become extremely important since “the observable social bond is composed of language ‘moves.’”¹⁷

¹⁶ Lyotard, *The Postmodern Condition*, 9-10.

¹⁷ Lyotard, *The Postmodern Condition*, 9-11, 46.

The postmodern social bond, for Lyotard, is language games which are “the minimum relation for society to exist.”¹⁸ Messages have different forms and effects depending on their type. The addressee, after receiving a message, undergoes displacement, “an alteration of some kind that not only affects him in his capacity as addressee and referent, but also the sender.”¹⁹ This provokes a countermove, which many times are not “good” since they are reactionary. Lyotard notes the importance of displacements since they might lead to an unexpected move. Humans engaged in conversation use a variety of language games, but institutions, many times, “privilege certain classes of statements.”²⁰ This is usually based on rules, but these rules are not necessarily written down.

Statements are “judged to be ‘good’ because they conform to the relevant criteria (of justice, beauty, truth, and efficiency respectively) accepted in the social circle of the ‘knower’s’ [*sic*] interlocutors.”²¹ These are opinions and this consensus is based on narratives. Narrative knowledge does a variety of things. For Lyotard, first, “narratives allow the society in which they are told . . . to define its criteria of competence and . . . to evaluate according to those criteria what is performed within it.”²² Second, multiple language games can be conducted in narratives. Third, the rules that the social bond are based on are transmitted though narratives. Finally, narratives legitimate themselves.

¹⁸ Lyotard, *The Postmodern Condition*, 15.

¹⁹ Lyotard, *The Postmodern Condition*, 16.

²⁰ Lyotard, *The Postmodern Condition*, 16-17.

²¹ Lyotard, *The Postmodern Condition*, 19.

²² Lyotard, *The Postmodern Condition*, 19-20.

Lyotard summarizes, “They [narratives] thus define what has the right to be said and done in the culture in question, and since they are themselves a part of that culture, they are legitimated by the simple fact that they do what they do.”²³

Lyotard argues, on the other hand, that scientific knowledge is drastically different. There are two conditions that scientific statements must meet. One, they must be available for repeated observations (replication) and two, the scientific community must give the statement their consensus. Since consensus is required, the research game under science is dialectical. The teaching game, within science, on the contrary, is didactic. The teacher, or sender, knows more than the student, or addressee. The goal of the teacher is for the student to become the expert and eventually participate in the dialectical research game.²⁴

Through descriptions of narrative and scientific knowledge Lyotard contrasts their essence. Scientific knowledge is based on the denotative language game where the criteria of distinction is true/false. This is different from narrative knowledge which allows for a wide variety of language games, which make up the social bond. In scientific research, only the sender needs to be competent and a scientific statement is always subject to falsification. Finally, scientific knowledge requires that the sender be familiar with previous research in the field. Lyotard states:

Both are composed of sets of statements; the statements are “moves” made by the players within the framework of generally applicable rules; these rules are specific to each particular kind of knowledge, and the “moves” judged to be “good” in one cannot be of the same type as those judged “good” in another, unless it happens that way by chance. It is therefore impossible to

²³ Lyotard, *The Postmodern Condition*, 20-23.

²⁴ Lyotard, *The Postmodern Condition*, 18, 24-25.

judge the existence or validity of narrative knowledge on the basis of scientific knowledge and vice versa: the relevant criteria are different.²⁵

In short, scientific knowledge can not be used to justify narrative knowledge. The same is true in the opposite direction.

Practical Implications

It is instructive to examine standardized testing within the context of Lyotard's language games. Standardized testing is conducted exclusively in the denotative language game since the criteria of distinction is limited to true/false. With respect to the three elements of language games (sender, addressee, and referent), standardized testing eliminates the role of the addressee. The student is left out of the process of determining the reality of the referent through consensus and lacks the ability to subject the "true" answer to falsification. The correct answer has already been established by the government. The institution of public education, through standardized testing, privileges the denotative language game to the exclusion of all others. Narrative knowledge is lost since it cannot be reduced to the true/false criteria of distinction. In order for citizens to exercise freedom of thought, narrative knowledge is essential, because citizens, in addition to determining truth, must contemplate issues relating to justice, efficiency, happiness, beauty, amongst others.

Legitimation Through Performativity

Lyotard continues his analysis by arguing that through "performativity," the scientific denotative language game has been coopted by the technical language game. To do this, Lyotard illustrates how the research practice is altered in postmodern societies. These

²⁵ Lyotard, *The Postmodern Condition*, 25-26.

changes include “a multiplication in methods of argumentation and a rising complexity level in the process of establishing proof.”²⁶ Both have implications for science and are discussed in order.

Philosophical Foundations

First, Lyotard shows that in order for a scientific statement to be accepted, its “axiomatics,” the assumptions of the researcher, must first be accepted. As a result, scientific knowledge is made up of a variety of language games based on its axiomatics and “moves” depend on the players accepting the rules of the game (axiomatics). Lyotard notes that there are two different types of “progress” in knowledge. These include the invention of a “new move (a new argument) within the established rules” and the invention of “new rules, in other words, a change to a new game.”²⁷

Second, Lyotard shows that scientific observation has been greatly enhanced through the use of technology which, in order to establish proof, has become a necessity.²⁸ Technology is expensive resulting in those with money having a greater probability of verifying their scientific statements and determining what counts as truth. As a result, Lyotard argues, “science becomes a force of production.”²⁹ The language game of science

²⁶ Lyotard, *The Postmodern Condition*, 41.

²⁷ Lyotard, *The Postmodern Condition*, 42-43.

²⁸ Recall, technology requires the performativity or efficiency game where the criteria of distinction is efficient/inefficient unlike science which requires the denotative game where the criteria of distinction is true/false.

²⁹ Lyotard, *The Postmodern Condition*, 44-45.

is no longer the denotative game, but is now controlled by performativity. Research, and subsequently science, in the postmodern society is legitimated through performativity.³⁰

Lyotard also shows how performativity dominates teaching in a postmodern society through a discussion of education. If one assumes that an established body of knowledge exists in a society, then it is necessary to determine how it should be diffused through education. Knowledge is diffused through education based on the answers to the following questions: “Who transmits learning? What is transmitted? To whom? Through what medium? In what form? With what effect?”³¹ Since research is controlled by the performative game instead of the denotative game, it follows that the answer to those questions will be different in a postmodern society. Lyotard explains this change, “The transmission of knowledge is no longer designed to train an elite capable of guiding the nation towards its emancipation, but to supply the system with players capable of acceptably fulfilling their roles at the pragmatic posts required by its institutions.”³² Education becomes dominated by the same language game as science. The essential thing transmitted is “an organized stock of established knowledge” necessary for the new professional class.³³ Teachers are not necessarily needed since “knowledge” can just as easily be obtained from machines. The important question becomes: “Where to access information?” The only criteria of distinction that counts is the efficient/inefficient, not true/false or just/unjust.

³⁰ Lyotard, *The Postmodern Condition*, 46-47.

³¹ Lyotard, *The Postmodern Condition*, 47-48.

³² Lyotard, *The Postmodern Condition*, 48.

³³ Lyotard, *The Postmodern Condition*, 50.

Practical Implications

Standardized testing has significant implications for freedom of thought when examined critically through Lyotard's notion of performativity. The established body of knowledge, or "Truth," is diffused through education through the medium of the standardized test which is dominated by the scientific denotative language game. If the denotative scientific language game has been coopted by the technical language game, then the correct answer on the standardized test might be determined solely based on whatever individual or group had acquired the requisite money and technology to "verify" that particular aspect of knowledge. Freedom of thought requires students to consider a variety of opinions and viewpoints, not the perspective of a privileged individual or group chosen by the government. As a result, performativity dominates public education through standardized testing, not the critical education question: "What counts as knowledge?" Lyotard's notion of performativity controls education and teaching, as a result, is no longer necessary.

Legitimation by Paralogy

While research and education are currently dominated by the performative language game, Lyotard does not believe that legitimation needs to be based on the efficient/inefficient criteria of distinction. Lyotard advocates for a system of legitimation based on "paralogy," as opposed to legitimation based on a grand narrative or based on the current paradigm in science, the stable system.

Philosophical Foundations

Lyotard notes that postmodern science, as opposed to science based on the stable system, is concerned with:

undecidables, the limits of precise control, conflicts characterized by incomplete information, '*fracta*' [emphasis in the original] catastrophes, and pragmatic paradoxes. It is changing the meaning of the word *knowledge* [emphasis in the original], while expressing how such a change can take place. It is producing not the known, but the unknown.³⁴

Systems thinking, currently the paradigm of science, leads to stability which is inconsistent with this new research in the field of science. The problem is that, "The stronger the 'move,' the more likely it is to be denied the minimum consensus, precisely because it changes the rules of the game upon which consensus had been based."³⁵ Lyotard refers to this type of behavior as "terrorist." He describes terror as, "the efficiency gained by eliminating, or threatening to eliminate, a player from the language game one shares with him. He is silenced or consents, not because he has been refuted, but because his ability to participate has been threatened."³⁶ For Lyotard, it is not about achieving consensus, achieving dissension is what counts for a legitimation based on paralogy. Lyotard argues that to begin to do this one must recognize that language games are heterogeneous in order to renounce terror and that any consensus must be local.³⁷

³⁴ Lyotard, *The Postmodern Condition*, 60.

³⁵ Lyotard, *The Postmodern Condition*, 63.

³⁶ Lyotard, *The Postmodern Condition*, 63-64.

³⁷ Lyotard, *The Postmodern Condition*, 61, 66.

Practical Implications

In effect, standardized testing utilizes terror. Lyotard describes the process in the following way:

What is a crime is to impose that silence on another, who is then excluded from the interlocutory community. Moreover, an even greater wrong is added to this injustice, since the one who is banished, being prohibited from speaking, has no means to appeal his/her banishment. Whether political, social, or cultural, the exercise of terror is as follows: to deprive the other of the ability to respond to that deprivation.³⁸

Standardized testing operates through terror by preventing the most important stakeholders with respect to public education, students and teachers, from having a voice in determining what counts as knowledge or how to transmit and assess that knowledge.

Lyotard believes that any language game that involves terror is unjust. He explains, “Majority does not mean large number, it means great fear.”³⁹ Justice, according to Lyotard, occurs when no minority triumphs. He explains, “Basically, minorities are not social ensembles; they are territories of language. Every one of us belongs to several minorities, and what is very important, none of them prevails. It is only then that we can say that society is just.”⁴⁰ The practice of standardized testing allows the denotative language game to prevail above all other language games. There is much to fear as a result of standardized testing being used in public education, especially with respect to citizens’ right to freedom of thought.

³⁸ Jean-François Lyotard, *Postmodern Fables*, trans. Georges Van Den Abbeele (Minneapolis, MN: University of Minnesota Press, 1997), 209-210.

³⁹ Lyotard and Thébaud, *Just Gaming*, 99.

⁴⁰ Lyotard and Thébaud, *Just Gaming*, 95.

The Phrase

Through his seminal work, *The Differend*, Lyotard develops a much more complex notion of his concept of language games from *The Postmodern Condition*. In effect, Lyotard abandons his notion of language games in favor of the phrase as the basic unit of analysis.

Philosophical Foundations

Lyotard has a broad conception of what constitutes a phrase and gives numerous examples. Phrases include, “It’s daybreak; Give me the lighter? Was she there; . . . Here are some phrases.”⁴¹ For Lyotard, a phrase can even be thought of as an event. Examples of phrase events Lyotard provides are, “a shrugging of the shoulder, . . . the wagging of a dog’s tail, . . . silence.”⁴² There is always a phrase and it presents at least one universe (possibly many) which is composed of four parts, or “instances.” These include the addressor, the addressee, the referent, and the sense. The addressor is the sender of the phrase, the addressee is the receiver of the phrase, the referent is what the phrase is about, and the sense is what is signified about the phrase. Each of these instances can be equivocal, thus a phrase could present multiple universes. Every phrase belongs to a “phrase regimen.” The phrase regimen is the set of rules that make up the phrase. Examples of phrase regimens include the descriptive, prescriptive, and performative.⁴³

Phrases from different phrase regimens cannot be translated into other phrase regimens nor can the rules of one phrase regimen be applied to another. Lyotard notes:

⁴¹ Lyotard, *The Differend*, 69.

⁴² Lyotard, *The Differend*, 70.

⁴³ Lyotard, *The Differend*, xii, 13-14, 70, 80.

Incommensurability, in the sense of the heterogeneity of phrase regimens and of the impossibility of subjecting them to a single law (except by neutralizing them), also marks the relation between either cognitives or prescriptives and interrogatives, performatives, exclamatives . . . For each of these regimens, there corresponds a mode of presenting a universe, and one mode is not translatable into another.⁴⁴

Instead, phrases must be linked onto other phrases.

Linking can be done in a variety of ways, but linking itself is a necessity. This linking is done based on a “genre of discourse” that establishes the rules for linking depending on a particular goal. Examples of genres of discourse include dialogue, historical inquiry, logic, and science. Examples of goals include to know, to be just, and to evaluate. Linking not only establishes the relations between the phrase instances, but also limits the possible relations between phrases that might have occurred since one genre of discourse “wins” as opposed to the others that “lose.” This conflict between genres of discourse creates what Lyotard calls a “*differend*”⁴⁵ since multiple phrases from different phrase regimens can be linked onto the previous phrase based on multiple genres of discourse.⁴⁶

Practical Implications

The implied goal of standardized testing is to assess student knowledge. Each question and each answer choice on the standardized test can be considered a phrase. The genre of discourse of standardized testing limits the possible phrases acceptable on the test by controlling the linkages. Only descriptive, or cognitive, phrases that fit the true/false criteria of distinction are considered acceptable links in the standardized testing genre of

⁴⁴ Lyotard, *The Differend*, 128.

⁴⁵ Lyotard’s notion of the *differend* is defined in the next section.

⁴⁶ Lyotard, *The Differend*, xii, 29, 66, 70-71, 80, 89.

discourse. Although the phrase that represents the question can be equivocal, the phrases representing the answers do not allow for questions presenting multiple universes. The “correct” answer has already been determined by the addressor, the government, without any input from the addressee, the student. Assessing student knowledge need not be limited to the genre of discourse of standardized testing. As a result, the privileging of the genre of discourse of standardized testing by the government not only limits freedom of thought, but also constitutes a *differend*.

The *Differend*

Lyotard defines a *differend* as, “a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments.”⁴⁷ A *differend* is distinguished from litigation because in litigation, both parties agree to the rule of judgement. In a *differend*, there is a victim, not a plaintiff. A plaintiff is able to prove that the damages occurred, while a victim does not have the ability to prove the damages.

Philosophical Foundations

Lyotard further explains his concept of a *differend* saying it is:

the case where the plaintiff is divested of the means to argue and becomes for that reason a victim. If the addressor, the addressee, and the sense of the testimony are neutralized, everything takes place as if there were no damages . . . A case of differend between two parties takes place when the ‘regulation’ of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.⁴⁸

⁴⁷ Lyotard, *The Differend*, xi.

⁴⁸ Lyotard, *The Differend*, 8-10.

Lyotard provides an extensive description of how the *differend* can be indicated. Lyotard explains:

The differend is signaled by the inability to prove. The one who lodges the complaint is heard, but the one who is a victim, and who is perhaps the same one, is reduced to silence. . . . The differend is the unstable state and instant of language wherein something which must be able to be put into phrases cannot yet be. This state includes silence, which is a negative phrase, but it also calls upon phrases which are in principle possible. This state is signaled by what one ordinarily calls a feeling: “One cannot find the words,” etc. . . . In the differend, something “asks” to be put into phrases, and suffers from the wrong of not being able to be put into phrases right away.⁴⁹

Lyotard explains how the *differend* can be redressed. He notes:

To give the differend its due is to institute new addressees, new addressors, new significations, and new referents in order for the wrong to find an expression and for the plaintiff to cease being a victim. This requires new rules for the formation and linking of phrases. No one doubts that language is capable of admitting these new phrase families or new genres of discourse. Every wrong ought to be able to be put into phrases. A new competence (or ‘prudence’) must be found.⁵⁰

Lyotard provides an example of the *differend* based on Robert Faurisson, a Holocaust denier. Faurisson denies that gas chambers existed. As proof for the existence of gas chambers, Faurisson requires an eyewitness that was a victim of the gas chamber. Since there is not a victim that is alive and because the survivors are silent, Faurisson concludes that gas chambers do not exist. Lyotard believes that silence is a phrase and silence indicates that at least one of the parts of the phrase universe is denied. The silence might indicate that the addressor does not believe the addressee has the competence or is worthy to speak to about it (the addressee), that the referent never took place (the referent), that it cannot be expressed

⁴⁹ Lyotard, *The Differend*, 10, 13.

⁵⁰ Lyotard, *The Differend*, 13.

(the sense), and/or the addressor does not believe they have the competence to present it (addressor). Silence does not always indicate, as Faurisson believes, that the referent never took place. Faurisson is operating in a different genre of discourse. Anyone attempting to prove the existence of gas chambers to Faurisson is not going to be successful since both parties do not accept the same rule of judgement. This is an example of a *differend*.⁵¹

Practical Implications

Standardized testing is consistent with Lyotard's notion of a *differend*. Both teachers and students become victims as a result of the silence imposed by the government. Teachers are left out of the procedures to determine what counts as knowledge. In addition, a student might be able to prove competence through the use of a different phrase regimen, but responses in the standardized testing genre of discourse are limited to the cognitive phrases that have already been established by the government. From a Lyotardian perspective, this is troublesome since there is no objective reality.

Reality

Lyotard defines reality as, "a state of the referent (that about which one speaks) which results from the effectuation of establishment procedures defined by a unanimously agreed-upon protocol, and from the possibility offered to anyone to recommence this effectuation as often as he or she wants."⁵² Essentially, Lyotard argues that reality is a social construction that can be amended at any time. As a result, there is no such thing as an objective reality.

⁵¹ Lyotard, *The Differend*, 3-4, 14, 19.

⁵² Lyotard, *The Differend*, 4-5.

Philosophical Foundations

One such protocol is historical inquiry. In historical inquiry, it is necessary to validate cognitive phrases. Validation is a genre of discourse since it is impossible to validate a particular phrase within its own phrase regimen. Lyotard spends considerable time discussing the validation of cognitive phrases, which means establishing the reality of the referent.⁵³

The “name” is important in establishing the reality of the referent. Lyotard notes that it is the name that holds the descriptive phrase and the ostensive phrase together. For Lyotard, a name holds no meaning. Multiple descriptions can be attached to the same name. The reality of the referent can be determined if the referent is the same in three phrases. These phrases must include a descriptive phrase, a nominative phrase, and a ostensive phrase. Lyotard provides an example. The descriptive phrase is, “The Empire has a capital for its political center.” The nominative phrase is, “This capital is called Rome.” The ostensive phrase is, “Here is Rome.” A fourth phrase is also needed in order to acknowledge that the referent is the same in all three phrases.⁵⁴ Reality then, for Lyotard, is not objective and can never be certain, it can always be questioned. Lyotard further describes his view of reality, “Reality: a swarm of senses lights upon a field pinpointed by a world. It is able to be signified [descriptive phrase], to be shown [ostensive phrase], and to be named

⁵³ Lyotard, *The Differend*, 29, 48.

⁵⁴ Lyotard, *The Differend*, 39, 42-44, 47.

[nominative phrase], all three.”⁵⁵ Reality, as a consequence, causes a *differend*. Lyotard explains:

Reality entails the differend. *That’s Stalin, here he is* [emphasis in original]. We acknowledge it. But as for what *Stalin* [emphasis in original] means? Phrases come to be attached to this name, which not only describe different senses for it (this can still be debated in dialogue), and not only place the name on different instances, but which also obey heterogeneous regimens and/or genres. This heterogeneity, for lack of a common idiom, makes consensus impossible. The assignment of a definition to Stalin necessarily does wrong to the nondefinitional phrases relating to Stalin, which this definition, for a while at least, disregards or betrays.⁵⁶

In sum, according to Lyotard, reality is made up and determined by phrases. Since phrases are from a variety of incommensurable phrase regimens and genres of discourse, it is impossible for any objective depiction of reality to emerge. Consensus is not possible, only the *differend*.⁵⁷

A *differend* also occurs when the cognitive rules for establishing the reality of the referent are applied to other phrases. Not all referents are subject to cognition. Lyotard distinguishes between “objects of cognition” and “object[s] of an idea.” Objects of cognition, such as a cell, can be observed. Objects of an idea, such as freedom, cannot be observed. Freedom, or any object of an idea, according to Lyotard, are not referents for phrase regimens based on knowledge, nor can their reality be established. Lyotard describes the attempt to establish the reality of an object of an idea as “totalitarianism.” He explains:

If the requirement of establishing the reality of a phrase’s referent according to the protocol of cognition is extended to any given phrase, especially to

⁵⁵ Lyotard, *The Differend*, 50.

⁵⁶ Lyotard, *The Differend*, 55-56.

⁵⁷ Lyotard, *The Differend*, 84.

those phrases that refer to a whole, then this requirement is totalitarian in principle. That's why it is important to distinguish between phrase regimens, and this comes down to limiting the competence of a given tribunal to a given kind of phrase.⁵⁸

If there is no such thing as an objective reality, then there are fundamental implications with respect to the practice of standardized testing.

Practical Implications

The protocol for establishing reality through standardized testing resides with the government. The standardized tests are used to determine if schools are teaching the particular "Truth" established by the government. Students and teachers are both left out of deciding how students should be assessed and establishing the procedures for deciding the reality of the referent. Instead, teachers are subjected to teaching the particular "Truth" advocated by the government on the standardized test. Teachers are silenced.

Many aspects of knowledge that students need to be exposed to in order to become effective citizens are not objects of cognition, rather they are objects of an idea. For example, knowledge in the realm of efficiency, justice, and beauty are objects of an idea and are unable to be adequately translated into the cognitive arena. In addition, many aspects of citizenship require decisions and evaluations to be made regarding objects of an idea that are outside the cognitive phrase regimen. As such, the rules of the cognitive phrase regimen cannot be applied without constituting a *differend*. Standardized testing is totalitarian in nature since it requires that all knowledge be translated into cognitive statements. In addition, standardized testing represents a politics of the intellectual since the cognitive genre

⁵⁸ Lyotard, *The Differend*, 4-5, 27.

is advocated above all other genres. Instead of being prepared to become citizens, students are being taught a particular “Truth” sanctioned by the government.

Politics

Like cognitive phrases, prescriptive phrases which deal with politics require validation as well. This validation must take place outside of the prescriptive phrase regimen.

Philosophical Foundations

A prescriptive phrase requires a normative phrase to validate it.⁵⁹ Lyotard quotes an example from the work of Kalinowski. The prescriptive phrase is, “It is an obligation for x to carry out act α .” The normative phrase is, “It is a norm for y that ‘it is obligatory for x to carry out act α .”⁶⁰ Republics are legitimated on the notion that the addressor of the normative phrase (y) and the addressee of the prescriptive phrase (x) are the same. The maker of the law is subject to the law and the person subject to the law can make the law. The phrases become, “We decree as a norm that it is an obligation for us to carry out act α .”⁶¹ Lyotard argues that the homogenous “we” is really heterogenous.

As noted above, the “we” occupies two different positions, addressor of the normative phrase and addressee of the prescriptive phrase. The use of “we” masks this difference between incommensurable phrase regimens. Lyotard explains, “With the normative, whatever its supposed legitimation and whatever the form of this legitimation

⁵⁹ Lyotard, *The Differend*, 98.

⁶⁰ G. Kalinowski, *La Logique Des Normes* (Paris, France: 1972), Nos. 203-209, quoted in Lyotard, *The Differend*, 98.

⁶¹ Lyotard, *The Differend*, 98.

(myth, revelation, deliberation), one genre seizes upon heterogeneous phrases and subordinates them to the same set of stakes.”⁶² This is another example of the *differend*. Lyotard explains, “In the deliberative politics of modern democracies, the differend is exposed, even though the transcendental appearance of a single finality that would bring it to a resolution persists in helping forget the differend, in making it bearable.”⁶³ Lyotard continues:

The deliberative is more ‘fragile’ than the narrative (. . .), it lets the abysses be perceived that separate genres of discourse from each other and even phrase regimens from each other, the abysses that threaten ‘the social bond.’ . . . In a word: narrative is a genre; deliberation is a concatenation of genres, and that suffices to let the occurrence and differends sprout up within it.⁶⁴

The above account of the *differend* in deliberative politics of modern democracies leads to Lyotard’s notion of politics.

Politics, for Lyotard, is not a genre of discourse. Lyotard describes politics as, “the threat of the differend. . . . Everything is political if politics is the possibility of the differend on the occasion of the slightest linkage. Politics is not everything, though, if by that one believes it to be the genre that contains all the genres. It is not a genre.”⁶⁵ Since it is impossible to avoid the *differend*, Lyotard proposes that the importance of politics is to try and expose the *differend*. He explains, “What is at stake in a literature, in a philosophy, in

⁶² Lyotard, *The Differend*, 98, 144.

⁶³ Lyotard, *The Differend*, 147.

⁶⁴ Lyotard, *The Differend*, 150.

⁶⁵ Lyotard, *The Differend*, 138-139.

a politics perhaps, is to bear witness to differends by finding idioms for them.”⁶⁶ These new idioms, no doubt, will lead to other *differends*, which in turn must be exposed as well.

Practical Implications

Standardized testing, when analyzed through Lyotard’s notion of politics, does not prepare students to expose the *differend*. The standardized test attempts to mask the difference between phrase regimens by subjecting all phrases to the true/false criteria of distinction of the cognitive phrase regimen. Freedom of thought, like politics, necessitates multiple phrase regimens. Because the United States Supreme Court is the final arbitrator regarding constitutionality, it is important to consider standardized testing in light of the *Brandenburg* decision.

Brandenburg Test

As discussed previously, the Brandenburg test is used to determine the constitutionality of speech/thought. Suppression of speech/thought by the government, under *Brandenburg* (1969), requires that the speech/thought not only incite criminal activity, but also be likely to produce the said action. Standardized testing suppresses speech/thought by reducing all knowledge to cognitive phrases and silencing students and teachers. It is hard to imagine that all knowledge outside of the cognitive phrase regimen would incite criminal activity, let alone be likely to produce it. As a result, the suppression of speech/thought meets neither prong of the Brandenburg test. Subsequently, standardized testing is not consistent with the type of education necessary to prepare students to exercise their right to freedom of thought.

⁶⁶ Lyotard, *The Differend*, 13.

Summary

The purpose of this chapter was to examine the implications of standardized testing on freedom of thought through a Lyotardian lens. The Lyotardian examination revealed that standardized testing is conducted exclusively through cognitive statements and entirely in the denotative language game when freedom of thought requires other language games. The examination also showed that standardized testing privileges the viewpoint of certain individuals and groups who hold power instead of the multiple viewpoints necessary to sustain freedom of thought. In addition, standardized testing operates through terror and is unjust. The practice constitutes a *differend* since the genre of discourse limits phrases to the cognitive phrase regimen. As a result, teachers and students become victims. Finally, the Lyotardian examination reveals the totalitarian nature of standardized testing which does not allow for multiple phrase regimens and does not prepare students for citizenship. Considering the United States Supreme Court's *Brandenburg* decision, it was concluded that standardized testing is not consistent with the type of education necessary to prepare students to exercise their right to freedom of thought.

Chapter 6

Standardized Testing and Political Judgement:

A Lyotardian Examination

There is no genre whose hegemony over the others would be just.¹

-Jean-François Lyotard

Introduction

The purpose of this Critical Enquiry is to examine whether the practice of government mandated standardized achievement tests of knowledge in American public schools is consistent with the type of education necessary for citizens to exercise their right to freedom of thought in order to make informed political judgements. Beginning with a review of the notion of political judgement, this chapter is an examination of the implications of standardized testing on political judgement through a Lyotardian lens. Since the analysis depends on an adequate understanding of Lyotard, Lyotard's philosophy is integrated throughout the analysis.

¹ Lyotard, *The Differend*, 158.

Political Judgement

As discussed in Chapter 1, successful governance in a democracy requires citizens who possess the ability and resources to make informed political judgements. Political judgements are made regarding the allocation of values. The notion of political judgement, as discussed in Chapter 3 and Chapter 4, changes throughout history. Beginning with Protagoras, political judgement was considered to be inside the individual. Plato, on the other hand, situated political judgement outside the individual. Truth is only possessed by philosopher kings who, having escaped the metaphorical cave, are exposed to truth. Aristotle, taking a more practical approach, argued that through virtue, individual citizens could make appropriate political judgements. Cicero and Augustine, like Plato, situated political judgement outside the individual. Cicero looked to an eternal force only understood by the wise man, while Augustine noted that the ultimate judgement rests with God. Aquinas also situated political judgement with God, but privileged the work of Aristotle instead of Plato. Machiavelli moves political judgement back to the realm of the individual dependent on the situation at hand. Science becomes dominant with respect to political judgement with Bacon. Hobbes, on the other hand, brings political judgement solely in control of the absolute monarch. Descartes believed that “correct” reason will lead to correct judgement. Milton supported a free commonwealth and a political judgement that rests with individuals. Spinoza’s notion of political judgement is consistent with Milton, as is Locke.

Montesquieu was primarily concerned with preventing abuse of power and, as a result, situated political judgement with elected representatives. Hume believed that only the upper class should possess political judgement. Political judgement, for Rousseau is based

on his notion of the general will. Kant believed that individuals ought to possess political judgement using regulative judgement based on his idea of freedom. Hegel, who argued that the population is too large in modern society, did not support individual citizens possessing political judgement. Mill, a utilitarian, supported citizens utilizing the Utility principle to determine political judgements. Marx urged for the abolition of private property and supported a communist society. Nietzsche was critical of any notion of political judgement and Heidegger challenged the prevailing notion of truth. Finally, Rawls position on political judgement is consistent with modern democracies in that it resides with the individual in the voting booth. The remainder of this chapter examines the implications of standardized testing on political judgement.

Lyotardian Examination

This section is a deconstruction of the practice of standardized achievement testing through the work of Lyotard. Each section begins with the philosophical foundations followed by the practical implications.² Of particular importance for this deconstruction is Lyotard's *Just Gaming*. Presented as a conversation between Lyotard and Jean-Loup Thébaud,³ *Just Gaming* entails much of Lyotard's work on political judgement. Specifically, this text concerns the notion of a criteria for judgement. The discussion begins with Lyotard and Thébaud highlighting the unusual nature of how the controversial book *Libidinal Economy* was written. Lyotard associates himself with the Sophists when explaining that he did not intend *Libidinal Economy* to be dialectical, where readers can ask the author

² See footnote 8 in Chapter 5.

³ Jean-Loup Thébaud was editor of *L'esprit*.

questions to determine the truth, but to be instead, persuasive. *Just Gaming*, in addition, is not intended to discover the truth in *Libidinal Economy*, but rather to be an entirely new book based on a conversation. Lyotard notes the difference between this book, a conversation, and previous books in that the goal is not necessarily to be consistent with previous work. He explains that a conversation is an entirely different language game than a book. For Lyotard, *Libidinal Economy*, was about “cast[ing] bottles to the waves, you don’t know to whom they are going, and that is all to the good.”⁴ Lyotard describes this type of writing as postmodern.⁵

Lyotard distinguishes between modern and postmodern. Postmodern means that there is no subject of history. Lyotard explains, “what we call modernity [postmodernity], he no longer knows for whom he writes, since there no longer is any taste; there no longer is any internalized system of rules that would permit a sorting out, the dropping of some things and the introduction of some others, all of this before the fact, in the act of writing.”⁶ For Lyotard, the postmodern is about trying out new things and that there are no solid criteria to judge things, as opposed to the modern. In the modern, “stable judgments of taste . . . can be supposed, and new works can be created with these judgments as models.”⁷ Essentially, the significant difference between modern and postmodern is that no criteria for judgement

⁴ Lyotard and Thébaud, *Just Gaming*, 1-9.

⁵ Lyotard does not use the term postmodern in *Just Gaming*. Instead, he uses the term modern. Lyotard’s use of the term modern in *Just Gaming* is similar to his use of the term postmodern in *The Postmodern Condition*. As such, this study will use the term postmodern when summarizing aspects of Lyotard’s writing that utilize the term modern. Brackets will be inserted following quotations when the word modern is used to clarify. See the asterisk on page 16 of *Just Gaming* for further clarification.

⁶ Lyotard and Thébaud, *Just Gaming*, 9-10.

⁷ Lyotard and Thébaud, *Just Gaming*, 9-11.

exists within the postmodern. Lyotard uses the term “pagan”⁸ to denote a scenario where one judges without criteria. This judgement can occur in a wide variety of areas, including truth, beauty, justice, politics, and ethics. For Lyotard, “modernity [postmodernity] is pagan.”⁹ The question of *Just Gaming* is, how can one determine what is just/unjust without a criteria for judgement.

Paganism

Lyotard, in *Just Gaming*, refers to the process of making judgements without criteria as paganism. Lyotard notes that justice in the Western tradition has always involved a fixed criteria of judgement that dominates questions of justice. Lyotard describes this as a paradox since it is based on the idea that the “prescriptive can be derived from the descriptive.”¹⁰ A prescription deals with a command, while a description deals with truth. Lyotard argues that a statement cannot pass from one to the other. This model of justice is incompatible with Lyotard’s notion of paganism.

Philosophical Foundations

Lyotard utilizes the work of Aristotle to help explain his notion of paganism. Lyotard notes that, based on Aristotle’s *Nicomachean Ethics*:

a judge worthy of the name has no true model to guide his judgments, and that the true nature of the judge is to pronounce judgments, and therefore prescriptions, just so, without criteria. This is . . . what Aristotle calls

⁸ Lyotard does not use pagan as a derogatory term.

⁹ Lyotard and Thébaud, *Just Gaming*, 15-16.

¹⁰ Lyotard and Thébaud, *Just Gaming*, 19-21.

prudence. It consists in dispensing justice without models. It is not possible to produce a learned discourse on what justice is.¹¹

Aristotle's judge and paganism is about judgement in the realm of opinion, not truth, and it is a case by case judgement. There is no metadiscourse for justice. The other component in Lyotard's description of paganism is the elimination of the theory of autonomy from the question of justice. The theory of autonomy implies that prescriptions determined and applied to society as a whole will be just.¹² Lyotard explains paganism:

On the contrary, in paganism, there is the intuition, the idea – in the almost Kantian sense of the term, if I may say so – that is, the idea that no maker of statements, no utterer, is ever autonomous. On the contrary, an utterer is always someone who is first of all an addressee, and I would even say one destined. By this I mean that he is someone who, before he is the utterer of a prescription, has been the recipient of a prescription, and that he is merely a relay; he has also been the object of a prescription. To determine paganism then, one needs not only to oppose it to the theory of the model, to give this name to the theory that one finds in Plato, but one must also oppose it to the theory of autonomy.¹³

Lyotard provides as an example, the Cashinahua Indians. When the Cashinahua tell a story, they are essentially relays. The story has been told to them before and it is their obligation to tell someone else. The teller's name is not important, the tradition is. This is heteronomy, not autonomy. The author is anonymous. This is the pagan game, and one of the three pragmatic positions Lyotard describes.¹⁴

¹¹ Lyotard and Thébaud, *Just Gaming*, 22, 26.

¹² Lyotard and Thébaud, *Just Gaming*, 25, 28-31.

¹³ Lyotard and Thébaud, *Just Gaming*, 31.

¹⁴ Lyotard and Thébaud, *Just Gaming*, 32-36.

The first pragmatic position is that of autonomy. Philosophical discourse is an example. In this position, the addressor is privileged and has control and authority. The second pragmatic position is that of obligation. An example of this is Jewish thought. In this position, the addressee is privileged and has the duty to listen. The third pragmatic position is that of pagan. An example would be the Cashinahua Indians described above.¹⁵ Following the Cahinahua Indians, Lyotard summarizes the idea of pagan:

one will have to judge therefore by opinion alone, that is, without criteria. And here I get back to Aristotle. We are always within opinion, and there is no possible discourse of truth on the situation. And there is no such discourse because one is caught up in a story, and one cannot get out of this story to take up a metalinguistic position from which the whole could be dominated. We are always immanent to stories in the making, even when we are the ones telling the story to the other. . . . there is no place from which one could photograph the whole thing.¹⁶

For Lyotard, the pagan position implies that there is no such thing as a metadiscourse. It is important to examine the implications of standardized testing on political judgement from a Lyotardian perspective.

Practical Implications

Standardized testing has implications for political judgement when analyzed through Lyotard's notion of paganism. Standardized testing, as discussed in Chapter 5, is limited to cognitive statements that can be declared true/false. If there is no fixed criteria of judgement, as Lyotard argues through his notion of paganism, and political judgements must be made in the realm of opinion based on an Aristotelean case by case judgement, then students need

¹⁵ Lyotard and Thébaud, *Just Gaming*, 37-38.

¹⁶ Lyotard and Thébaud, *Just Gaming*, 43.

to be exposed to much more than cognitive statements. Political judgements are made in numerous language games. For example, citizens must make judgements in the realm of truth, beauty, and ethics. Of particular importance is the prescriptive language game in which citizens must determine what is just/unjust. Standardized testing, operating in the pragmatic position of autonomy, in which the government has complete control and authority, does not prepare students to make the political judgements necessary in Lyotard's postmodern society. Lyotard continues by further explaining language games.

Language Games

Lyotard expounds on his notion of language games in response to Thébaud's repeated questioning of why prescriptive statements cannot be derived from descriptive statements. Lyotard argues that to derive a prescription from a description has been "the tradition of the intellectual."¹⁷

Philosophical Foundations

Lyotard notes, in contrast, that prescriptive statements and descriptive statements are part of different language games. He also provides examples of other language games including the scientific denotative language game and the artistic language game. Lyotard further explains the concept of language games:

When I say: There is no common measure, it means that we know that we know of nothing in common with these different language games. We merely know that there are several of them, probably not an infinite number, but we really do not know. In any case, the number is not countable for the time being, or if it is, it is so provisional at best. We also know that these are games that we can enter into but not to play them; they are games that make us into their players . . . these games are not at all made equal. On the

¹⁷ Lyotard and Thébaud, *Just Gaming*, 44-45.

contrary, they are in a striking disparity. The fact that I myself speak of this plurality does not imply that I am presenting myself as the occupant of a unitary vantage point upon the whole set of these games . . .¹⁸

Lyotard is arguing that each game has its own rules and one game cannot be translated into another. He explains that this would be as absurd as trying to take the rules of chess and translate them into the rules of checkers. In addition, one language game is in no way superior to another. Language games are always played between people. There is an addressee, an addressor, and a referent. Also, people play multiple language games at the same time and jump from one game to another.¹⁹

Lyotard differentiates an instruction from a slogan. Lyotard uses the word instruction to signify what should be done in a certain situation. Instructions, as a result, are local. An example would be a principal giving directions to the teachers in the school. A slogan, on the other hand, implies that the situation is permanent. An example would be the Secretary of Education giving directions to teachers in every school. Lyotard notes:

When one speaks of instructions, one is basically implying that one does not really know the permanent general context and that one would have to be quite conceited to be able to do an analysis of it. And so one works almost 'case by case,' move by move, and instructions are a move-by-move process.²⁰

Lyotard privileges instructions over slogans since they more readily respect his notion of paganism. No metadiscourse exists to unify the different language games. No one game can speak for all the others. Instead of oppression, "to import into a language game a question

¹⁸ Lyotard and Thébaud, *Just Gaming*, 45, 51.

¹⁹ Lyotard and Thébaud, *Just Gaming*, 52-54.

²⁰ Lyotard and Thébaud, *Just Gaming*, 55-56.

that comes from another and to impose it,”²¹ Lyotard advocates for a “multiplicity of small narratives.”²²

Lyotard explains that in paganism, there is no master language game. He explains, “What is pagan is the acceptance of the fact that one can play several games, and that each of these games is interesting in itself insofar as the interesting thing is to play moves. And to play moves means precisely to develop ruses, to set the imagination to work.”²³ Imagination can be used to create and/or modify moves or even language games. The pagan then, according to Lyotard, is able to use this imagination in a variety of language games. Someone who is not pagan tends to “believe in the signified of what they are saying, that they stick to this signified, and that they think they are in the true. This is where paganism stops and where something like doctrine, let us say, gets back in.”²⁴

Practical Implications

Examining the implications of the practice of standardized testing on political judgement based on Lyotard’s notion of language games raises important issues. The standardized test is established based on Lyotard’s concept of a slogan since the standardized test is given to every student. As a result, the practice of standardized testing operates under the assumption that all situations can be generalized and does not allow for local school district considerations. In addition, the cognitive language game oppresses all other language

²¹ Lyotard and Thébaud, *Just Gaming*, 53.

²² Lyotard and Thébaud, *Just Gaming*, 58-59.

²³ Lyotard and Thébaud, *Just Gaming*, 60-61.

²⁴ Lyotard and Thébaud, *Just Gaming*, 61-62.

games and operates as a metadiscourse. This fits with what Lyotard calls the tradition of the intellectual and doctrine. Since political judgement requires multiple language games, schools (to be consistent with the primary purpose of preparing students for citizenship) ought to focus more on instructions and less on slogans.

Justice

The conversation moves in the direction of the prescriptive language game at this point, since this is the game of justice. Lyotard notes that when the prescriptive language game is pure, no ontological discourse dominates it.

Philosophical Foundations

Western thought, following Plato, has generally used some ontological discourse to determine what is just. But, for Lyotard, as discussed above, reason cannot be used to derive prescriptions and prescriptions can never be justified. The prescriptive language game is not about content, but “obligation.” Lyotard describes injustice, that which is unjust, as the exclusion of the pragmatics of obligation. In short, injustice is threatening or preventing someone from taking part in the prescriptive language game. For Lyotard, terror is an example of this injustice. With terror, “it is the death of another person, a threat of death that is used as an argument. . . . the real aim is to force the third party [public opinion] to yield.”²⁵ Thébaud (Lyotard’s interlocutor) transitions this into a discussion of what justice ought to be.

For Lyotard, justice cannot be derived, instead he believes there is a “transcendence of justice.” Lyotard does not use transcendence of justice to mean there is a transcendence,

²⁵ Lyotard and Thébaud, *Just Gaming*, 64-67.

but instead he means that he does not know who is the sender of a particular prescription. The obligation that results, according to Lyotard, is regulated by the Kantian “Idea.” For Lyotard, this Idea is “the preservation of the possibility of the prescriptive game.”²⁶ Lyotard provides a thorough description of the prescriptive language game:

When I say ‘transcendence,’ I take over a term used by Lévinas, and also by Kant when the latter says that which obligates is something absolutely beyond our intelligence. In terms of language games, it must be granted that to understand what a prescription or obligation is, the pole of the sender must be neutralized. Only if it is neutralized, will one become sensitive, not to what it says, but to the fact that it prescribes or obligates. It may seem paradoxical . . . But there are language games in which the important thing is to listen, in which the rule deals with audition. Such a game is the game of the just. And in this game, one speaks only inasmuch as one listens, that is, one speaks as a listener, and not as an author. . . . the position of sender must remain empty. No one may put herself or himself there, no one may be the authority. . . . the prescriptive utterance comes from nothing: its pragmatic virtue of obligation results from neither its content nor its utterer.²⁷

The absence of any universal ontological discourse to determine justice has significant implications with respect to standardized testing.

Practical Implications

Standardized testing has significant implications for political judgement when examined through Lyotard’s notion of justice. As discussed previously, standardized testing operates through terror since it prevents students and teachers from determining the reality of the referent. In addition, the practice of standardized testing is unjust since students are prevented from taking part in the prescriptive language game. Instead, the prescriptive language game is transformed into the descriptive language game. Students are taught that

²⁶ Lyotard and Thébaud, *Just Gaming*, 69-70.

²⁷ Lyotard and Thébaud, *Just Gaming*, 71-72.

the only criteria of distinction that counts is true/false. It is impossible for standardized testing to utilize the prescriptive language game since the position of the sender is occupied by the government. The government is not subject to neutralization. Since it is impossible to eliminate the authority of the government, standardized testing cannot be used to prepare citizens to make informed political judgements.

Politics of Judgement

Lyotard continues by attempting to formulate a political judgement that can be used in the postmodern. Lyotard argues that due to the collapse and failure of “rational politics,”²⁸ it is necessary to formulate a postmodern “politics of judgment.”²⁹ Lyotard wavers between two positions. These positions are a pagan position and a Kantian position. Both the pagan position and Kantian position respect the notion that a prescriptive cannot be derived from a descriptive. Knowledge does not play a role in ethics, politics, or justice. In addition, both accept that judgement is made on a case by case basis.³⁰ Both positions are described below.

Philosophical Foundations

The pagan position is that of the Sophists and the Aristotle of the politics and ethics. The pagan position is based on a philosophy of opinion or convention. Lyotard believes that this is problematic due to the great number of unjust acts that have occurred throughout history as a result of various conventions. The Holocaust is one such example. The Kantian

²⁸ Rational politics is the Western tradition of deriving prescriptions from descriptions or the ought from the is. In short, there is no knowledge in matters of ethics, politics, or justice. Lyotard and Thébaud, *Just Gaming*, 75.

²⁹ A “Politics of Judgment” is the title for the fifth day of the interview. Lyotard and Thébaud, *Just Gaming*, 73.

³⁰ Lyotard and Thébaud, *Just Gaming*, 73-74.

position is that of both Kant's second and third critiques which is based on the philosophy of the Idea. In this philosophy, the regulator is the Idea of justice ("totality of practical reasonable beings").³¹ Lyotard describes this as a "reflective use of judgment, that is, a maximization of concepts outside of any knowledge of reality. . . . the Idea is not an opinion. The Idea is an almost unlimited use of the concept: one has concepts, and then one maximizes them."³² Lyotard believes this is problematic since the Idea is not based on opinion.

Lyotard believes that in order to fully give meaning to his term *pagan*, the two positions need to be brought together. He explains, "Because then it would include justice, and a justice that would not be merely unanimous convention, which is something that cannot be tolerated."³³ To do this, Thébaud suggests a "politics of judgment." This politics of judgement would be based on opinions, but regulated by Kant's notion of judgement.³⁴ Ideas are not determining concepts, they are only used in the reflective. As such, the reflective use of an Idea never determines what one should do. Instead, the Idea regulates. An individual must judge whether something is compatible with the Idea and this is not based on knowledge or the descriptive at all. While Lyotard accepts the use of the Idea as the regulating aspect of judgement, he rejects Kant's notion of the Idea of totality.³⁵

³¹ Lyotard and Thébaud, *Just Gaming*, 73-75.

³² Lyotard and Thébaud, *Just Gaming*, 75.

³³ Lyotard and Thébaud, *Just Gaming*, 81.

³⁴ Lyotard and Thébaud, *Just Gaming*, 81-83.

³⁵ Lyotard and Thébaud, *Just Gaming*, 85-88.

Lyotard is concerned with using the Idea to promote “multiplicity” or “diversity.”³⁶ Lyotard believes that if Kant would have written a critique of political reason, Kant might well have accepted that politics is in the realm of opinions and he would have used Aristotle’s notion of the judge who decides on a case by case basis. Lyotard believes that what makes someone judge is the Idea. This Idea, for regulating justice, has no basis in knowledge. As a result, the Idea cannot be used as a criteria for judgement. If the Idea is used as a determinant of justice, Lyotard believes terror (discussed above) would result.³⁷

Practical Implications

Lyotard’s politics of judgement raises concerns with respect to the implications of standardized testing on political judgement. Standardized testing does not prepare students to make informed political judgements for a variety of reasons. First, since prescriptions can not be derived from descriptions, consistent with Lyotard, standardized testing can only operate in the cognitive language game and does not prepare students to effectively operate in other language games such as the prescriptive language game. Second, since knowledge does not have a role in ethics, politics, or justice, standardized testing, by focusing solely on cognitive knowledge at the exclusion of values, does not prepare students to make judgements. Third, since judgements are made on a case by case basis, according to Lyotard, standardized testing does not allow for judgement since the government has already determined the correct response. Lyotard’s politics of judgement is incompatible with

³⁶ Lyotard and Thébaud, *Just Gaming*, 87.

³⁷ Lyotard and Thébaud, *Just Gaming*, 88, 91-92.

standardized testing since standardized testing does not allow students to operate in the realm of opinion nor utilize reflective Ideas in the course of making judgements.

Multiplicity of Language Games

Lyotard concludes *Just Gaming* by describing a framework based on a “multiplicity of language games.” Having multiple language games that are incomprehensible means that there is no unity or totality, in contrast to the beliefs of Kant. Lyotard, instead, argues to combine a “politics of opinion” with a “politics of Ideas.”³⁸

Philosophical Foundations

But the Idea for Lyotard, unlike Kant, is not based on finality or convergence, but divergence. Justice, according to Lyotard, occurs when no minority prevails. He explains, “Basically, minorities are not social ensembles; they are territories of language. Every one of us belongs to several minorities, and what is very important, none of them prevails. It is only then that we can say that society is just.”³⁹

If language games are pure, that is they are not contaminated by the prescriptive language game, the idea of justice is not needed. But, if the prescriptive game enters into another language game, then the idea of justice, based on plurality, should regulate them. Justice, in this sense, is about ensuring that the rules of a particular language game are followed. Lyotard also describes how to ensure justice, within the prescriptive language game, once the language games have been made pure again. The Idea of multiplicity is what regulates justice for Lyotard. Justice is conducted case by case and it is impossible for one

³⁸ Lyotard and Thébaud, *Just Gaming*, 93-95.

³⁹ Lyotard and Thébaud, *Just Gaming*, 95.

to ever be sure that they have been just. Lyotard notes, “any attempt to state the law, for example, to place oneself in the position of enunciator of the universal prescription is obviously infatuation itself and absolute injustice.”⁴⁰ Lyotard believes that any language game that involves terror is unjust. He explains, “Majority does not mean large number, it means great fear.”⁴¹ A minority language game only becomes a majority language game when it dominates other language games.

Lyotard ends *Just Gaming* by summarizing his two notions of justice. First, there is a multiplicity of justice. Each language game has its own rules and a good move is determined by the criteria of distinction for that particular language game. Lyotard explains, “Justice here does not consist merely in the observance of the rules; as in all the games, it consists in working at the limits of what the rules permit, in order to invent new moves, perhaps new rules and therefore new games.”⁴² Second, there is the justice of multiplicity.

This is a universal prescription. Lyotard explains:

It prescribes the observance of the singular justice of each game such as it has just been situated: formalism of the rules and imagination in the moves. It authorizes the ‘violence’ that accompanies the work of imagination. It prohibits terror, that is, the blackmail of death toward one’s partners, the blackmail that a prescriptive system does not fail to make use of in order to become the majority in most of the games and over most of their pragmatic positions.⁴³

⁴⁰ Lyotard and Thébaud, *Just Gaming*, 96-99.

⁴¹ Lyotard and Thébaud, *Just Gaming*, 99.

⁴² Lyotard and Thébaud, *Just Gaming*, 100.

⁴³ Lyotard and Thébaud, *Just Gaming*, 100.

Lyotard's notion of a multiplicity of language games is important to consider since standardized testing might not respect minority language games.

Practical Implications

Since the government determines what counts as knowledge on the standardized test, standardized testing is not consistent with Lyotard's notion of justice. The language game of the government is the only game that counts. Minority language games are not respected since the government has exclusive control and operates as the majority language game. The language game of standardized testing is not pure since the prescriptive language game, amongst others, is subjected to the rules of the descriptive language game. Standardized testing will not be just until it respects the rules of language games. Even if standardized testing became just, it still would be inconsistent in preparing citizens to make informed political judgements. In addition, according to Lyotard, it is impossible to know if one has been just or has made the "right" judgement. Since the government operates as the "enunciator of the universal prescription," standardized testing is "obviously infatuation itself and absolute injustice," based on a Lyotardian perspective. As a result, standardized testing is not consistent with the type of education necessary to prepare students to make informed political judgements.

Summary

The purpose of this chapter was to examine the implications of standardized testing on political judgement through a Lyotardian lens. The Lyotardian examination revealed that political judgement operates in the realm of opinion which requires students to be exposed to more than just the cognitive language game privileged on the standardized test. It was also

revealed that local school districts have no voice. The standardized test is unjust and operates through terror. Judgement is not allowed since the government has already determined what counts as "Truth." Finally, this examination revealed that standardized testing does not respect minority language games and is not pure. As a result, it was concluded that standardized testing is not consistent with the type of education necessary to prepare students to make informed political judgements.

Chapter 7

Summary, Conclusions, and Recommendations

In a world where success means gaining time, thinking has a single, but irredeemable, fault: it is a waste of time.¹

-Jean-François Lyotard

Introduction

As discussed in Chapter 1, this Critical Enquiry recognized that the purpose of American public education is to prepare students for the fundamental political office of citizen. Successful governance requires citizens who have the resources and abilities to make informed political judgements with respect to the allocation of values. This necessitates that citizens utilize the constitutional guaranteed right of freedom of thought. The specific purpose of this Critical Enquiry was to examine whether the practice of government mandated standardized achievement tests of knowledge in American public schools is consistent with the type of education necessary for citizens to exercise their right to freedom of thought in order to make informed political judgements. The general methodology of Critical Enquiry is based on Derrida's notion of deconstruction with the specific framework of this enquiry based on the work of Lyotard.

¹ Jean-François Lyotard, *The Postmodern Explained*, trans. Don Barry, Bernadette Maher, Julian Pefanis, Virginia Spate, and Morgan Thomas (Minneapolis, MN: University of Minnesota Press, 1993), 36.

Summary

In order to conduct this enquiry and provide context for the reader, it was necessary for several chapters to provide the foundation. Chapter 2 began with an analysis of the primary purpose of American public education and the explicit connection between freedom of thought and freedom of speech. This was followed by four different rationales for freedom of speech. These included the argument from the perspective of truth, the argument from the perspective of democracy, the argument for the good life, and the argument for individuality. The chapter continued by surveying the history of freedom of thought beginning in Ancient Greece and culminating with the United States Supreme Court's *Brandenburg* decision.

Chapter 3 and Chapter 4 continued to provide the foundation by surveying the history of the notion of political judgement. Chapter 3 was concerned with political judgement from Protagoras to Locke. Initially considered inside the individual with Protagoras, political judgement moved outside the individual with Plato. Aristotle established political judgements with the practical sciences. Cicero situated political judgement with the wise man while Augustine and Aquinas situated political judgement with God. Machiavelli advocated a practical version of political judgement and Bacon placed it with science. Hobbes supported an absolute monarch to make political judgements while Descartes believed that reason would lead to the appropriate political judgement. Milton, Spinoza, and Locke, all placed political judgement with the individual.

Chapter 4 was concerned with political judgement from Montesquieu to Rawls. For Montesquieu, political judgement was within the hands of elected representatives. Hume

situated political judgement with the elite while Rousseau introduced the concept of general will. Kant stressed the use of regulative judgement based on his notion of freedom. Hegel thought individual citizens should not possess political judgement while Mill believed individual citizens could determine political judgement based on the Utility principle. Marx advocated communism and Nietzsche criticized all notions of political judgement. Heidegger challenged the prevailing notion of truth. Rawls believed that political judgement ought to rest with voters in the voting booth.

The Lyotardian examination was conducted in Chapter 5 and Chapter 6. Chapter 5 focused on the implications of the practice of standardized testing on freedom of thought, while Chapter 6 focused on the implications of standardized testing on political judgement. The Lyotardian examination revealed that standardized testing is not consistent with the type of education necessary to prepare students to exercise their right to freedom of thought nor is the practice consistent with the type of education necessary to prepare students to make informed political judgements.

Conclusions

This enquiry revealed that the practice of using government mandated standardized achievement tests of knowledge in American public schools is antithetical to the type of education necessary to prepare students to exercise their right to freedom of thought in order to make informed political judgements. The Lyotardian examination revealed that freedom of thought and political judgement require a wide variety of language games while the practice of standardized testing is limited to the denotative cognitive language game. Freedom of thought and political judgement also require access to multiple viewpoints while

standardized testing privileges the views of certain individuals and groups. Standardized testing marks a *differend*, is totalitarian in nature, and represents a politics of the intellectual. The practice advocates a particular “Truth” sanctioned by the government and silences teachers, students, and local school districts through terror. The government, through standardized testing, operates as the majority language game and is not pure.

Recommendations

It is instructive to consider the significant difference between government education and public education. The practice of standardized testing is not uniform with the notion of public, rather it is much more similar to the connotation behind the term government. Senses of government include, “continuous exercise of authority over the action of subjects or inferiors,” “authoritative direction or regulation,” and “control.”² Public, on the other hand, is signified as an antonym of private in relation to the people in a particular area or country. Senses of public include, “pertaining to the people as a whole,” “Done or made by or on behalf of the community as a whole,” “authorized by, acting for, or representing, the community,” “all members of the community,” and “not restricted to the private use of any person or persons.”³

Public education, consistent with the definition of public, ought to be open to all members of the community and represent a variety of opinions. Public education ought not to be restrictive privileging a particular individual or group of individuals and ought not to be limited to standardized testing. Future enquiry ought to consider policy and practice that

² *Oxford English Dictionary*, 2nd ed., s.v. “Government.”

³ *Oxford English Dictionary*, 2nd ed., s.v. “Public.”

would enable American public education to be consistent with the American democratic ideals in order to redress the *differend*. Policymakers ought to eliminate the practice of standardized achievement tests in American public schools in order to adhere to a notion of public education instead of government education.

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